TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1924

No. [redacted]93

MRS. M. L. HOUSE, PLAINTIFF IN ERROR,

vs.

ROAD IMPROVEMENT DISTRICT NO. 5, OF CONWAY COUNTY, ARKANSAS, AND R. E. BARTLETT, SHERIFF OF CONWAY COUNTY, ARKANSAS

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED JUNE 22, 1925

(29,694)

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[fol. 1] **IN THE SUPREME COURT OF ARKANSAS**

MRS. M. L. HOUSE, Appellant,

vs.

ROAD IMPROVEMENT DISTRICT #5 OF CONWAY COUNTY, ARKANSAS, et al., Appellees.

STIPULATION AS TO CONTENTS OF RECORD—Filed June 12, 1923.

It is stipulated that the record herein, excepting an issue for consideration presented by the plaintiff in the event that the federal questions raised were decided against her, consists of the following:

1st. The complaint:

2nd. Amendment to conform to the proof:

3rd. Additional amendment to conform to the proof:

4th. Demurrer and answer:

5th. Demurrer and answer to the amendment to the complaint:

6th. The evidence material to the federal questions other than those determined by the demurrer was:

(a) That the Notice described in the complaint which was considered by the Court in passing upon the demurrer to the complaint was as follows, to-wit:

"Notice of the Assessment of Benefits in Road Improvement District No. 5 of Conway County, Arkansas

Notice is here given that the assessment of benefits and damages in Road Improvement District No. 5 of Conway County, has been completed and is on file with the Secretary of said Commissioners, and is open to inspection and a copy of said assessment of benefits and damages is on file in my office and is open to inspection and that the said Commissioners for said District will on the 12th day of August attend at the County Court House of Conway County, for the purpose of hearing any complaint upon any of said assessments of benefits or damages. Any complaint of any of said assessment of benefits or damages must be filed with the secretary of said commissioners in writing before the date of hearing.

[fol. 2] Witness my hand and seal of said court, this 21st day of July, 1919.

J. L. Williams, Clerk. (Seal.)

(b) Testimony was offered by the plaintiff tending to sustain each allegation of the complaint and amendments thereto, and

testimony was offered by the defendant tending to sustain each allegation of the answer; said testimony was taken in the form of depositions and duly filed before the trial and at the trial the demurrers were first heard and were sustained as to all allegations of the complaint and amendments thereto, except as to two issues, to-wit:

First. That the Shaw's Bridge lateral was abandoned.

Second. That the Legislature acted arbitrarily in including plaintiff's land in the District and excluding said other lands alleged to be specially benefited.

All other issues presented on the complaint and amendments thereto were determined upon the demurrers.

It is stipulated that the testimony as to the abandonment of the Shaw's Bridge lateral was conflicting, and the Chancellor held that it was not aban-oned and the Supreme Court has sustained that finding, and the plaintiff does not desire to preserve her evidence upon that issue.

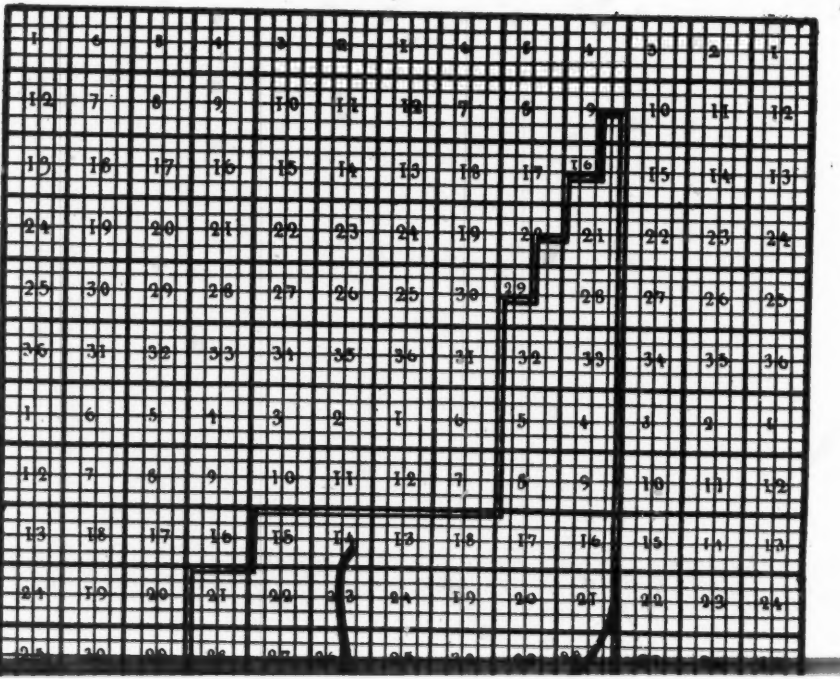
The testimony introduced by the plaintiff and heard by the Chancellor on the second issue above referred to as to the arbitrary action of the Legislature was in substance as follows:

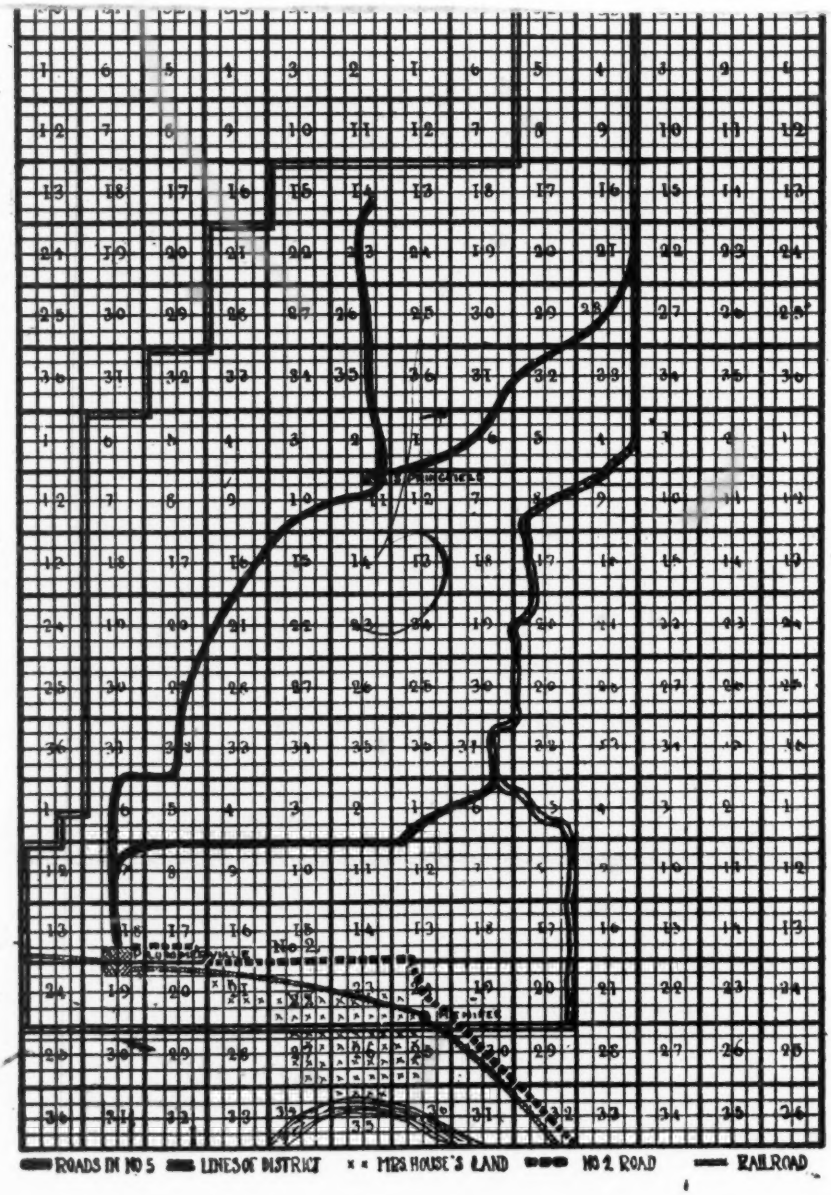
(Here follows Exhibit A to Stipulation, marked page 2½.)

[fol. 3] A map was introduced in evidence showing the lines of the District and the roads to be improved therein: a reduced copy of it is attached as "Exhibit A" and explanatory evidence of said map to the effect that the physical conditions on either side of the improved road were similar, and that the physical conditions southeast of Plummerville were the same as at an equidistant southwest thereof, and testimony was adduced tending to show that the plaintiff's lands in sections 21 and 22, Township 6 North, Range 15 West, were separated from the improved roads, the nearest point upon the improved roads being the town of Plummerville, by Gap Creek and cypress brakes and swamps.

That the only practical route of travel from said sections 21 and 22 to reach Plummerville is to pass without the District and to go south into section 28 and then strike a road leading into Plummerville, through said section 28 and through section 29 and section 30, which said sections 28, 29 and 30 are out of the district and pass back into the district in section 19, in which Plummerville is situated, or go south without the district into section 28, and strike another road leading east through sections 28, 27 and 26 to Menifee, which said sections 28, 27 and 26 are without the district and from Menifee to travel the public road of District No. 2 into the town of Plummerville and then reach the improved road of District No. 5; that there is no feasible or practicable route, owing to the topo-

✓ Exhibit A to Stipulation. 2½




No 2
ROADS IN NO 5
LINES OF DISTRICT
MRS HOUSE'S LAND
NO 2 ROAD
RAILROAD

graphy of the land and the physical condition of the creeks, brakes and swamps, to reach the improved road in District No. 5 from said sections 21 and 22, without excessive expense in bridging and constructing embankments, other than through said routes aforesaid. A map of said district, which was introduced in the trial of this cause, is attached hereto and marked Exhibit "B."

[fol. 4] That testimony was introduced by defendant district tending to controvert testimony offered by Appellant on this issue that the Chancellor decided this issue in favor of the district, but the Supreme court in passing on same, has this to say:

"The south boundary line of said District No. 5 is the south line of sections 19, 20, 21, 22, 23, and 24 in tp. 6 N., range 15 W., in Conway County. A part of appellant's lands were located in section 21 in said district. Appellant alleged and made proof that, on account of Gap Creek and cypress brakes, the only practical route from said lands in section 21 to the improved roads in said district is to cross the south boundary line thereof and pass over lands not included in the district, and a part of which was nearer the improved road than appellant's lands. Appellant argues that this situation invalidates the act creating the district under the rule announced in Heinemann v. Sweatt, 130 Ark. 70, and subsequently approved in Milwee v. Tribble, 139 Ark. 574; Johns v. Road Imp. Dist., 142 Ark. 73, and Ruddel v. Rutherford, 143 Ark. 49. The rule announced in those cases is that when it appears, from the face of the act creating an improvement district, or from conditions or situations of which the court will take judicial knowledge, that lands of complaining owners are entirely separated from the roads to be improved by intervening lands excluded from the district, or by impassable obstructions or barriers, the inclusion of the lands thus separated renders the act void because arbitrary and discriminatory. In the instant case the act itself, nor any impasse of which this court will take judicial notice, separates appellant's lands in section 21 from the improved roads in the district. On the contrary, none of the lands embraced in the district, according to the face of the act and such facts as this court judicially knows, are [fol. 5] separated from the improved roads by an impasse or intervening excluded lands. The Ruddell case, supra, which, learned counsel so earnestly insist, controls the case at bar, is not applicable because the impasse in that case was an island and navigable stream, of which this court took judicial notice. The only obstructions between appellant's lands in section 21 and the improved roads in said district are a small creek and cypress brakes, of which this court takes no judicial notice."

7th. The decree of the Conway Chancery Court.

8th. All proceedings of the Supreme Court, including the motion for rehearing and the opinion of the court and the dissenting opinion.

Given under our hands this 8th day of June, 1923.
Joseph M. Hill, Henry L. Fitzhugh, Attorneys for Appellant.
J. W. Johnson, Attorney for Appellees.

[File Endorsement Omitted.]

[fol. 6] IN THE CHANCERY COURT OF CONWAY COUNTY, ARKANSAS, FEBRUARY TERM, 1922, APRIL 19, 1922

[Title omitted]

Pleas Before Hon. W. E. Atkinson, Judge of the Ninth Chancery District

Appearances: Jos. M. Hill, for plaintiff; J. W. Johnston, for defendant.

CAPTION

Be it remembered that on the 19th, day of April 1922, the same being an adjourned day of the February 1922, term of the Chancery Court of Conway County, Arkansas, The Honorable W. E. Atkins, regular judge of said Court present and presiding. The following proceedings were had in the above entitled cause, to-wit:

[fol. 7] IN THE CHANCERY COURT OF CONWAY COUNTY

[Title omitted]

COMPLAINT IN EQUITY—Filed & Summons Issued May 26, 1921

Comes Mrs. M. L. House, plaintiff herein, and complains of the defendants, Road Improvement District No. 5 of Conway county and R. E. Bartlett, Sheriff of Conway county, and for her cause of action states:

That she is and has been for the past four years resident of the City of Washington, District of Columbia, and was during all the times in this complaint mentioned.

That she owns in the defendant district lands which were assessed as 960 acres. There is a description of the lands of hers assessed in said District, together with the distance of each tract from the road improved in said District and the assessed value of the same and the assessment of benefits of the same hereto attached and made a part of this complaint and marked "Exhibit A." That said lands are assessed at $15,780.00 and the benefits assessed for the improvement of the road to be improved in said defendant district at $15,780.00. which is to be paid in twenty annual installments of $946.80 amounting in all to $18,936.00.

The General Assembly in 1919 at its regular session passed Act 245 creating road district in Conway County, Arkansas, including the

[fol. 8] defendant road district, which said Act was approved on March 11, 1919. That said Act was a local and special Act and the notice of the intention to apply therefor was not published in the locality where the lands to be affected were situated thirty days prior to the introduction of the Act in the General Assembly and no evidence of such notice was exhibited to the General Assembly before said Act was passed and said Act was unnecessary as a general law providing for the creation of road district was in force and could have been made applicable. The plaintiff alleges that said Act was passed in contravention to Sections 25 and 26 of Article V of the Constitution of 1874.

The plaintiff does not allege that said Act was void on account of the non-compliance with the provisions of the Constitution and alleges materiality of this allegation is on the subject of notice to her of the proceedings under said Act by which a lien was created against the property in favor of the defendant district without her knowledge and alleges that if the provisions of Section 26 had been complied with, she would have had better opportunity of ascertaining the proceedings against her land and alleges that if proceedings had been had under general law that she would have had more full and ample notice of such proceedings than is provided in said special Act No. 245.

Plaintiff alleges that she had no information whatever of the passage of the General Assembly of Act No. 245 until long after proceedings under that Act had fixed a lien upon her property as hereinafter stated. That said Act provides that the Commissioners of [fol. 9] the defendant district should make plans for the improvements contemplated in said Act and an estimate of the cost thereof and file the same with the county clerk and that immediately thereafter the clerk shall give notice by publication once a week for two weeks in some newspaper published in the county designating the date when the county court will be in session for the submission of said plans, and that the last insertions of said notice to be not less than five days before the consideration of the plans by the county court.

The said Act makes it the duty of the county court on said date to consider said plans and hear any landowner interested therein, and to pass upon and adopt said plans or modify the same and when approved by the county court they shall be the plans of the district.

That the defendant district proceeded thereunder to form said plans and filed the same with an estimate of the cost thereof and gave a short notice for interested parties to appear, which said notice was less than twenty days, and said plans were approved by the county court on July 19th, 1919.

That said Act provided that immediately after the approval of the plans by the county court, the commissioners should proceed to make an assessment of benefits to be received by each tract of land in the district and that the assessments list containing the same should remain in the custody of the Commissioners and a copy should be filed with the county clerk.

That on the day the plans were approved the Commissioners filed [fol. 10] the assessment on July 19, 1919, the county clerk issued a notice in the form prescribed in said Act #245, dated July 19, giving notice that said assessment was on file with the Secretary of the Commission and a copy of it in the county clerk's office, open to inspection, and that the Commissioners would on the 12th of August, attend at the Court House in Morrillton, Conway county, Arkansas, for the purpose of hearing any complaint upon said assessment of benefit, and that the complaint of any assessment must be filed with the Secretary of the Commission in writing before the date of said hearing. That said notice was published in the Conway County Unit, a newspaper published in said county on July 23 and on July 30th, August 2, August 6 and August 12th, the last three being within ten days of the date and not to be reckoned the plaintiff to file her objections to the assessment of benefits on her land on or before August 11, 1919, and that the first publication being on July 23rd, under the rule for computation in Section 9756 of Crawford & Moses Digest there was but 18 days actual notice given and the said notice was in compliance with said statute.

Plaintiff alleges that said section 20 of the said Act requires the commissioners after the approval of the plans by the county court to proceed to make an assessment of benefits to be received by each tract of land, or parts of land and all other real property within the district and to describe the same in a book in which all of the lands shall be shown and shall show opposite each tract in said book the assessment of benefit against each tract.

[fol. 11] The name of the supposed owners shall be shown opposite the several tracts. Said sections requires that this book shall be kept by the Commissioners and a copy thereof filed with the county clerk for inspection of all persons interested therein and the notice given thereunder states that said assessment is to be found in the county clerk's office. That said Commissioners did not comply with said section of said Act and did not set down the description of the real estate in said assessment book but merely set down names of the owners and opposite the names a valuation, and opposite that an assessment of benefits without filing in the said book the property assessed. That said assessment would not give information to the land owners of their property assessed and was not a compliance with the statute and the same was a jurisdictional requirement of the statute and the notices based thereupon was void and of no effect. That since this matter was investigated by the grand jury, said assessment list has been filled in, but it was not filled in until long after the notice thereof was given.

The plaintiff alleges that she had no actual notice of this proceeding, saw no copy of the newspaper and had no*t* information whatever as to the creation of the district, or of the proceedings of the Commissioners in adopting plans, the orders of the court in approving the same, nor the proceedings of the Commissioners in assessment of her lands with benefits for the construction of the improvement until long after said dates when such proceedings were had.

That said Act in Section 21, authoritizes any person who has

complained in writing of his assessment of benefits and who feels [fol. 12] aggrieved by the action of the Commissioners after the hearing and any other person whatsoever who may have any objection to any assessment of benefits or the proceedings under the Acts or of the action of the commissioners to file his complaint thereof in the chancery court within ten days after hearing by the commissioners herein provided for, which was on the 12th day of Aug. 1919.

That the plaintiff had no knowledge or information of said hearing, constructive notice of which only was given her and that only for the period of eighteen days for her to file her complaint, did not have the opportunity of availing herself of said remedy, by a suit in chancery within ten days after August 12th.

The plaintiff alleges that she was entitled to due and timely notice before the assessment became a lien against her property of a hearing as to the justice and equity of the same and that she was not given such notice by said constructive notice by the publications aforesaid, the utmost time for which would have been eighteen days and that such purported notice for such short period of time was manifestly insufficient; and that the provisions of the statute authorizing it and as thus carried out by the Commissioners such purported notice amounts to a denial of Justice.

The plaintiff alleges that the assessment of benefits against her land constituting a lien thereon on August 12th, 1919, by virtue of her failure to object to said assessment on said date was the deprivation of her property, contrary to the law of the land as is [fol. 13] guaranteed her by section 21 of Article 2 of the Constitution of 1874, and deprives her of her property without due process of law as is guaranteed to her by Section 8 of Article 2 of the Constitution of 1874.

The plaintiff further alleges that the filing of said assessments against her lands as set forth in "Exhibit A" and the same becoming final and a lien upon her property on August 12, 1919, on account of her failure to file in writing here objections thereto, on or before August 11th, 1919, as provided in said Act or notice, and that the only notice of such proceedings authorizing said lien to be created was the publication of the notice hereinbefore set out, to-wit: the publication of said notice in the Conway County Unit, on July 23, and July 30th, and that such notice was not such notice as is required to constitute due process of law within the meaning of the 14th Amendment to the Constitution of the U. S.

And the plaintiff alleges that the act of the defendant district acting under and in pursuance to the statute of the General Assembly of Arkansas referred to-wit: Act #245 of 1919, amounted to the State through such agencies depriving the plaintiff of her property without due process of law and such proceedings is void as in conflict with the said 14th Amendment to the Constitution of the United States and the plaintiff sets out and relies upon the same as her cause of action in praying the court to declare void the assessment against her property made final by said Act and such proceedings [fol. 14] on said 12 day of August, 1919.

Plaintiff further alleges that having no notice in fact of said proceedings of August 12, 1919, she had no opportunity to take an appeal within ten days thereafter as provided in Section 21 of said Act, that she might have taken had she known of said proceedings, and alleges that during said ten days she was residing at her home in the City of Washington, in the District of Columbia, and had no knowledge or information of any of said proceedings until long thereafter.

Further complaining the plaintiff alleges that she was entitled to a reasonable notice constructively, if not actually, before a lien could legally be created against her land for said assessments, and that creating said lien on August 12, 1919, as hereinbefore set out was itself a deprivation if her property right without due process, contrary to the provisions of the State Constitution and of the 14th Amendment to the Constitution of the United States, and further alleges that if said ten day period therein provided for bringing suit in the chancery court could be tacked to and counted in the time given her by the law for contesting the assessments that the same would be unreasonably short, amounting to in all, only 28 days of constructive notice before her property was taken, but the plaintiff alleges that said ten days cannot be added to and attacked on the 18 days' notice she was given constructively of said hearing, because said notice did not give information that such lengthened time would be given, on the contrary said notice stated that "Any [fol. 15] complaint of any of said assessment of benefits or damages, must be filed with the Secretary of said Commissioners in writing before the date of said hearing," thereby affording only notice of that which it gave, which was of this hearing on August 12th and said notice did not give any information of the creation of said district by special Act of the General Assembly.

The plaintiff alleges further that the notice prescribed in Section 20 of said Act 245 is insufficient on its face to constiute notice to the plaintiff and other landowners of the assessments made against their property. That said notice does not give the names of the owners of the land, nor a description of the land, nor any reference to any act of the Legislature, proceedings of court, or any other source of information by which those reading and receiving the notice would be notified that their lands were within the district assessed.

That the notice given of the filing of the plans of the road improvement required by Section 18 does not impart information of the lands affected by the said plans and gives no reference to any act, map, or order of court by which the lands to be affected by the purported improvement could be identified.

That said Act itself did not name any date for hearing leaving said hearing as to plans and as to contesting assessments to be given by the Clerk of the county court and prescribed a form which was insufficient to give the necessary information, so that said notice, even if duly published — for sufficient length of time to constitute due process of law.

[fol. 16] That the only source of information of existing said

Act was from an examination of Acts passed by the General Assembly in the office of the Secretary of State. That the said Acts were not printed and distributed and given circulation until long after the things and matters herein complained of occurred.

That said Act itself being passed contrary to the Constitutional provisions that notice should be given of its introduction should of itself constitute no notice.

Plaintiff alleges that the notices given by the Commission of the defendant's district were in conformity to said Act and disclosed no further information than is prescribed in the Act to be disclosed and which, as alleged, is insufficient to constitute such notice as is required by due process of law before a lien can be legally created against the plaintiff's property.

The plaintiff states that the notice for the hearing of complaints against the assessment called for a meeting of the Commissioners on the 12th day of August, at the Court House, in the City of Morrilton, and she is not informed as to whether said meeting was held or not, alleges on information and belief that it was not, and asks that the defendant be required to make proof on this subject.

The plaintiff alleges that said notice was insufficient to meet the requirements of the State Constitution as to due process of law and proceedings conformable to the law of the land and is insufficient to meet the requirements of the 14th Amendment to the Con-
[fol. 17] stitution of the United States forbidding any State or any agency of the State to take property without due process of law.

The plaintiff alleges that as a non-resident of Arkansas and a resident of the District of Columbia, she was not chargeable with notice of the special Act passed by the Legislature contrary to the Constitutional provision *of* previous notice of its introduction, and her ignorance of said law was a mistake of fact of which equity should give relief.

Plaintiff alleges that the aforesaid assessment of benefits against her property was excessive, unreasonable and discriminatory, for which she is entitled to relief in equity for the following reasons, to-wit:

That the commissioners of the defendant district in assessing the benefits took as a basis therefor the valuation on the tax books of 1917, assuming that all property was assessed in the tax books equally, because they had been equalized by the Board of Equalization, as a basis for the assessment of benefits and divided the land into six zones according to the distance from the road, but classed all of the land which was in another district as in the 6th zone. The land of the plaintiff is assessed at 100% of its taxable valuation in said district, that the plaintiff owned a body of land originally consisting of 3,217 acres, but which was reduced by encroachments of the Arkansas River to about 2,900 acres, of which 930 acres is in the defendant district. That upon her entire tract there had been valuable cypress timber and in the year 1903 she sold timber from the
[fol. 18] entire tract for the sum of $35,000 and gave the purchaser ten years to cut the same and that said timber was all cut from her lands by the year 1915, and its value decreased by the extent of the

sale of her cypress timber thereon, notwithstanding this fact the assessment of 1917 carried her lands at the higher valuation originally introduced on account of the valuation timber thereupon. That in 1919, on a showing to the assessor and township Board of Equalization her valuation of the entire tract was reduced to $30,320.00, which reduction was entered of record on June 12, 1919; the assessment theretofore had been $43,030.00.

The land of the plaintiff included in the defendant district bore proportionately said higher valuation; that the assessment of benefits was made and filed in this district on July 19th and notwithstanding plaintiff's land had been reduced approximately 30%, the defendant Commissioners took the higher valuation of 1917 as a basis of the assessment, in this district, on the theory, that it was properly assessed, whereas the assessing officers had reduced the same more than a month prior to the Commissioners of the defendant district using the former valuation. That by reason thereof the plaintiff in the defendant district is assessed on a basis of 30% higher than the other lands in the district and higher than a just valuation thereof, on account of retaining the former values which had been given to it on account of the valuable timber thereon which had long prior to this date been removed therefrom.

That said land of the plaintiff in the district consisting of 960 acres is composed of about 300 acres of good land and comparable to the best land in that vicinity in value.

[fol. 19] About 150 acres in cypress brakes and sloughs and about 400 acres is low, wet bottom land of little value and could be reclaimed only by the expenditures of large sums of money for drainage and levee purpose. That there are no houses or other improvements upon the land of any considerable value; that $1,000 would be an execessive valuation for all the improvements thereon.

That the Commissioners of defendant district did not take into consideration the character and value of the land in assessing the benefits thereupon. That the assessment against her lands *are* grossly discriminatory and in many instances much better lands than here, lying within a levee district and protected from overflows by the levee are assessed for much less than her lands of less value are assessed and the proposed improvements add nothing towards the drainage and protection of her lands.

That other lands immediately adjacent to hers and of like character and value are assessed much lower than hers, and she is discriminated against in said assessments and alleges that she is prepared to show upon the final hearing a gross and inequitable discrimination against her property.

That the first information the plaintiff had of the passage of said special Act 245 and the assessment of benefits against her lands was in January, 1920, when she wrote to ascertain the amount of taxes due for the year 1919. That in order to avoid the penalties which would have been added against her land she paid to the defendant district the sum of $946.80 under protest.

[fol. 20] The plaintiff alleges that she has frequently since learning of the arbitrary and excessive assessment against her property

appealed to the Commissioners of the defendant district for relief; that they have denied the same unto her and notwithstanding these facts the defendant district is attempting to collect against her for the assessments of 1920 the sum of $946.80 and the defendant, R. E. Bartlett, as sheriff of said county has a warrant for the *the* collection of the tax against her land and under the provisions of said Act unless the same is paid in a short time (an extension having been granted on all of the lands for a short time by the defendant district) it will be levied upon.

The plaintiff states that the amount paid for the assessments of 1919 are more than should be justly paid by her for several years. on a fair and equitable imposition of benefits, even if the court should hold that her property is subject to assessment and she prays in the alternate that if the court holds her property is subject to the assessment as having been benefited that on the adjustment of the benefits in said district by the court that she be given credit against future assessments for the amount excessively paid in 1919.

Further complaining this plaintiff alleges that the inclusion of her land in said district is arbitrary exercise of legislative power and is void as such, and further alleges that the assessments of any benefits whatsoever against her land for the construction of improvements provided in said Act is arbitrary and without any just basis as her land situated in said district is not and cannot be benefited by the [fol. 21] improvements provided in said Act. That the improvement provided in said Act is for the construction of a road beginning at the City of Plumerville and running thence in a northeasterly direction to the town of Springfield and continuing in a general northeasterly direction to the Conway-Faulkner county line. Also a road beginning at Springfield and running thence in a general northerly direction and also a lateral beginning about two miles north of Plumerville and running in a generally easterly direction to the Conway-Faulkner county line to Shaws Bridge across Cadron Creek. That Plumerville is two miles distant from her land and the lateral running to Shaws Bridge is also its nearest point two miles north of her land.

That between said lateral and her land lies the main line of the Mo. Pac. R. R. and the public road to be improved in district No. 2 running from Plummerville east to Menifee. That all trade traffic, and other communication from the defendant's land and its vicinity either directly to Plummerville or go to some point on said improved road to reach Plummerville and there is no communication between said lands in business or in any way with the road running north from Plummerville. That the road running north from Plummerville and its laterals is beneficial to the country which they traverse and to the town of Plummerville, but are no benefit whatever to the present or future use of the plaintiff's lands and serves the direct traffic from plaintiff's land; and the imposition of an assessment upon the plaintiff's land results in taking plaintiff's property to pay for improvement to other peoples property and to help construct roads in other parts of the county, which from their [fol. 22] nature and future use would not be used by the owners or

occupants of the plaintiff's lands. That the Commissioners of the defendant district have authorized a bond issue of $363,000 and have sold $260,000 and have paid an excessive and unlawful commission and have only received therefor $207,308.25. That there is an authorized bond issue of $190,000 which has not been sold. That the Commissioners of said district have paid out for attorneys fees $5,630.00, which is an excessive amount to pay for said purpose. That should the court hold that any of plaintiff's land has received any benefits and that she should not be taxed therefor, then as a tax-payer she prays the court that the defendant district be required to account for said excessive fees paid for the bond sales and to attorneys.

Section 11 of Act 245 provides and makes it the duty of the Commissioners to make the improvements authorized as expeditiously and economically as possible and the plaintiff alleges on information and behalf that the Commissioners have not done so and prays that they be required to account to the court for their expenditures and purposes thereof. And prays upon a final hearing hereof that they be restrained from selling any further bonds until an accounting is had of the economical methods pursued by the Commissioners.

Plaintiff states that under the provisions of said Act 245 unless the assessment of 1920 is paid within the said short extended time there will a penalty of 25% added to the aforesaid amount and the Sheriff is required under penalty to proceed to collect said assessment and penalties.

[fol. 23] That the plaintiff is willing and ready to pay all just and equitable assessments made against her land based upon benefits received by it for the construction of the improvement in the defendant district if the court finds that her lands are benefited thereby.

That the plaintiff is advised that she has a good action in equity for relief against the assessments, and alleges that the imposition of said penalty is inequitable and prays that she be permitted to prosecute in good faith her suit for relief without imposition of said penalty and prays that for the protection of the Sheriff as well as for herself, that he be enjoined from collecting the tax of 1920 and from adding the penalty thereupon, and she offers to give good and sufficient surety that she will pay to the defendant district such assessments as to the court may find equitably to be due it, if any, for the year 1920, and prays that if the court holds that no benefits have accrued to her that she have judgment against the district for the amount paid in 1919, and in the alternative prays that if the court holds that she is benefited in some amount that she have credit for the excessive amount which she paid for the 1919 assessments in the years following in which payment was made under compulsion and duress and over protest.

The plaintiff alleges that the assessment and the notice for the year 1919 was void for reasons heretofore stated, to-wit: that proper assessment was not made out and filed with the county clerk for the inspection of the property owners and prays that the court so decree. The plaintiff further prays that she be given her day in

court to be heard upon the merits of the assessments of benefits [fol. 24] against her land and prays that the court find and declare that no valid assessment has been made against her property and further that her property will not be benefited by the improvement in said district and that she have judgment against the district for the amount of taxes which she paid under duress and protest in 1919, and the plaintiff further prays in the alternative that in the event the court should find any benefit to her land that a just and equitable assessment be made and that she be given credit for the payment of 1919 for the future years if the court should find she would be chargeable for any benefits in said district and for all other and further relief which the court may find her entitled to receive.

Hill & Fitzhugh, Attys. for Plaintiff.

STATE OF ARKANSAS,
County Sebastian:

I, Mrs. M. L. House, do upon oath state that I am the plaintiff in the above and foregoing complaint and the allegations therein are true.

Mrs. Mary L. House.

Subscribed and sworn to before me this 24th day of May, 1921. Mable Riley, Notary Public. (Seal.) My Commission expires Feby. 15th, 1925.

[File endorsement omitted.]

[fol. 25] EXHIBIT TO COMPLAINT

Road Improvement District Number 5

Land	Miles from road	Assessment of value	Assessment of benefits
N. E. S. W. 21-6-15....	2 miles	$240	$240
S. ½ N. W. 21-6-15...	2 miles	720	720
N. ½ S. E. 21-6-15....	2 miles	1,440	1,440
S. W. 22-6-15	2½ miles	1,920	1,920
S. E. 22-6-15	2½ miles	1,920	1,920
S. W. 23-6-15	2½ miles from 1st 4 miles from main road	4,800	4,800
S. E. 23-6-15	4 miles from main rd. ...	3,840	3,840
N. W. S. W. 24-6-15 ..	2½ mi. from lateral. 5 mi. from main rd. ...	300	300
S. ½ S. W. 24-6-15 ...	5 mi. from main rd.	600	600

Total acres, 960; assessed val., $15,780; assessed benefits, $15,780.

[fol. 26] IN THE CONWAY CHANCERY COURT

[Title omitted]

AMENDMENT TO THE COMPLAINT

Comes Mrs. M. L. House, plaintiff herein, and in addition to allegations made in her complaint in equity, hereby further complains of the defendants and alleges:

That Road Improvement District No. 5 is created arbitrarily and plaintiff's property *us* taxed dispr-portionately to other lands similarly located in relation to the improvement contemplated in said road district.

That the District is so arbitrarily created as to amount to denial of equal protection of law to the plaintiff, in the following particulars, to-wit:

That the District is created to construct a mainline of road from Plummerville in a northeasterly direction.

That except immediately adjacent to Plummerville that no benefit can accrue to the land situated south of Plummerville by the improvement of said road.

That plaintiff has 160 acres of land situated in section 21, the nearest part thereof being approximately two miles and the furtherest 2½ miles from Plummerville south and east of said town. That the remainder of the Plaintiff's lands are situated in sections 22, 23 and 24—a distance from 3 to 5½ miles south and east of the Town [fol. 27] of Plummerville. That said District only extends 2½ miles south and west of Plummerville and lands situated equidistant from Plummerville south and west thereof as are the lands of Plaintiff in section- 22, 23 and 24, are arbitrarily excluded from said District, and if the Plaintiff's land has any benefit from the said District all land equidistant in the opposite direction from Plummerville has an equal benefit and no burden is placed upon same.

That Plaintiff's lands in said District are separated from the rest of the District by Gap Creek, lakes and bayous and the Mo. Pacific Railroad and the improved road in District No. 2 of Conway County, and the roads in District No. 5 cannot be used from the lands of the plaintiff without going to Plummerville, a distance of from 2 to 5½ miles from her land and land similarly located south and west of Plummerville are not included in said District and have access to the roads of said District. That the District extends easterly from the improved road a distance of 7½ miles, whereas on the west side where there will be equal benefit from the improvement of said road, the District extends from 1½ to 2 miles, thereby arbitrarily including a large area on the east side and excluding a large area similarly situated and benefited, if the said area on the east side is benefited, from said District.

That there is a purported lateral beginning about 2 miles north

of Plummerville and running east which is used as an excuse for including the area on the east side while the corresponding area on the west is not included.

The plaintiff alleges that no substantial work has been done on said lateral and none is planned to be done upon it and even should it be improved into a good hard surface road it would only be a [fol. 28] benefit to lands adjacent to it and would be no benefit to Plaintiff's lands, and other lands similarly situated in the eastern part of the District which cannot gain access to it or use it without first going to the town of Plummerville to reach it, and from the main body of plaintiff's land the said lateral could not be reached without traveling about 7 miles and it is of no value whatever to the plaintiff's land or other lands similarly situated with the plaintiff and *it* of equal value, and if any value whatever be proved, for land similarly situated on the south and west of Plummerville equidistant from Plummerville as plaintiff's land which would likewise have access to it by going to it from the town of Plummerville.

Wherefore, the plaintiff alleges that the District is created so arbitrarily as to amount to a denial to her of the equal protection of the law and of taking her property for public purposes without compensation and of depriving her of her property without due process of law.

The plaintiff further alleges that section 16 of Act 245 under the District is created provides that as soon as the Commissioners have formed a plan for improvements they shall file the same with the county clerk of Conway County and that if any part of the road is to be graded but not surfaced with rock, gravel or other hard material this should be shown in said plans and the estimate of the cost shall state the aggregate cost of the construction of said improvement.

Plaintiff alleges that the defendant District did not comply with said provisions of the act and alleges the facts to be that on July 2, [fol. 29] 1919, said District filed in the office of the clerk of Conway county a document called "Specifications, proposal, contract and bond."

This document was prepared by Parks Engineering Company and was transmitted to the District under a letter of June 23, 1919, stating that it submitted to the Board of Commissioners of said District the following estimate of the cost of constructing a bituminous macadam road according to the plans and specifications hereto attached.

That attached thereto were plans and specifications and quantity estimates of cost, a proposal for constructions, contract and bond. That said document did not purport to be the plans adopted by the Board of Commissioners, but only the plans subsmitted to it by said Engineering Company. It did not show parts of said road to be graded but not surfaced with rock gravel or other hard material and did not show an estimate of the aggregate cost of the constructions of said improvement, other than an addition of various estimates of cost for various quantities to be used in said improvement, which is not such an estimate as is contemplated by said act. Notwithstanding the failure of the commission to comply with said statute an

order was made on July 16th that the plans were examined and approved, whereas there were no plans which purported to have been adopted by the Commission upon which the county court could have acted.

Plaintiff alleged that the filing of the plans as provided in section 16 of Act 245, is jurisdictional and the District failed to comply with [fol. 30] the said section, that all subsequent proceedings of the said District, especially in the levying of assessments against plaintiff's property are void.

Plaintiff further alleges that the plan of the said District prepared by the Parks Engineering Co. was not approved by the Highway Department and in fact the plans on file with the Highway Department are radically different from the plans of the Parks Engineering Company filed with the county clerk, and the approval endorsed on the plans of the Parks Engineering Company on file with the county clerk were not approval of the Highway Department contemplated by Section 14 of Act 245.

Wherefore plaintiff prays for the relief heretofore prayed in her complaint in equity for three additional causes as well as the causes set forth in her complaint in equity.

Hill & Fitzhugh, Attorneys for Plaintiff.

[fol. 31] IN THE CONWAY CHANCERY COURT

[Title omitted]

AMENDMENT TO CONFORM TO THE PROOF

Comes the plaintiff, Mrs. M. L. House and prays leave of the court to file this additional amendment to the complaint, alleging matters herein conformable to the proof adduced, as follows, to-wit:

That the legislature creating said District provided by Act 245 of Section 8 of 1919. That the road to be improved was to consist among other roads of a lateral from the main line beginning one and a half or two miles north of Plummerville and running thence in a generally easterly direction to the Conway-Faulkner County line at Shaw's Bridge, across Cadron Creek.

That the Commissioners after making the assessments complained of in the complaint herein abandoned said lateral known as the Shaw's Bridge or Caney Valley lateral and have eliminated it from the roads to be constructed as provided in said Act of the General Assembly of 1919.

Plaintiff alleges that the action of the Commissioners in abandoning and eliminating and lateral from the plans of construction (which said lateral was the only excuse for benefit to the Plaintiff's lands) rendered the assessment complained of in the original com- [fol. 32] plaint void.

Plaintiff further alleges that the Commissioners made material changes in the plans which were adopted by the county court after advertising as hereinbefore set forth, and that the said changes of plan were the elimination of the Shaw's Bridge lateral and the changing of the extent of the bituminous portions of said road, and is materially increasing the expense of the construction of said road over the estimates set forth in the plans which were approved by the county court.

That the said action of the Commissioners in making said material changes in the plans have rendered void the assessments for benefits hereinbefore set out and described.

Wherefore the plaintiff prays in addition to the complaint that for the reasons herein set forth, that the assessment of benefits complained of in the original complaint be enjoined and that the plaintiff have judgment against the District for the amount of taxes which she paid under protest.

Hill & Fitzhugh, Attorneys for Plaintiff.

[fol. 33] IN THE CHANCERY COURT OF CONWAY COUNTY, ARKANSAS

[Title omitted]

ADDITIONAL AMENDMENT TO CONFORM TO THE PROOF

Comes Mrs. M. L. House, the plaintiff herein, and in addition to the alegations in the complaints wherein the assessment of benefits is alleged to be discriminatory, excessive and lacking in uniformity with other property similar in value and location with plaintiff's property, further alleges:

That the Board of Commissioners accepted as a true basis of value the 1917 county assessment, without investigation of its equality and uniformity, and fixed the amount of benefits against plaintiff's land and all other lands in the said District based on a given percentage of said County assessment. That the method adopted by the Board of Commissioners necessarily reflected in the assessment of benefits any errors and discrimination in the 1917 assessment. That the 1917 County assessment was grossly excessive so far as plaintiff's land was concerned, and was reduced $15,000.00 or thirty-three and one-third per cent before the assessment of benefits in the defendant District had been finally approved by the Commissioners, and the Commissioners were ignorant of that fact.

That the reduced assessment of 1919 was excessive compared with [fol. 34] similar land and situation. That the 1917 assessment used as a basis for the assessment by the defendant District's Commissioners was grossly discriminatory and excessive and amounted to a confiscation in the following particulars, to-wit:

The plaintiff had 725 acres of land covered constantly by water, consisting of lakes, bayous, sloughs and creeks.

That said land was of no commercial value and was assessed from $4.50 to $12.50 per acre, and assessment of benefits levied on it on a percentage basis of said values. That from the very nature of said land no possible enhancement in value could be attributed to it by the improvement of the road in defendant District. That the said Commissioners were ignorant of the character of said land or else wilfully perpetrated a fraud on plaintiff.

That the assessment aforesaid against said land amounts to confiscation and should be declared void on said account.

That 1,030 acres of plaintiff's land consist of low, wet and overflowed land not in cultivation and from which the merchantable timber had been taken, and is not susceptible of cultivation except through a system of drainage and levees prohibitive in cost. That said land was assessed at from $5.00 to $20.00 per acre. That its utmost market value would be from $3.00 to $5.00 per acre and on a fifty per cent basis the highest assessment should be $2.50 per acre, and it is assessed from twice to eight times said amount.

[fol. 35] That the defendant's Commissioners were ignorant of the character of said land or else wilfully perpetrated a fraud on the plaintiff.

That the assessment levied upon said land amounts to confiscation and should be declared void on such account.

That the plaintiff has about 300 acres of hill land of small value which is excessively assessed and not uniform with similar lands, and that said Commissioners were ignorant of its character and location.

That the plaintiff's property in the District of real value is about 700 acres of bottom land, a part of which is above overflow but most of it is subject to overflow, and none of it is protected by levees. That over half of it is assessed at $30.00 per acre and the remainder at $22.50 per acre. That $30.00 per acre is the highest amount assessed against any land in the county. That other land in the county assessed at $30.00 per acre is worth double the amount of the plaintiff's lands; and land in the immediate vicinity to plaintiff's land and more accessible to the road of the defendant District is assessed at $30.00 and is worth double plaintiff's land; and hundreds of acres of land immediately adjacent to plaintiff's land and more accessible to the road in defendant District and of as great or greater value than plaintiff's best land, is assessed at from $5.00 to $15.00 per acre. That no land in the vicinity is assessed uniformly with plaintiff's.

That these facts were unknown to the Commissioners when they assessed the benefits or else they wilfully perpetrated a fraud on [fol. 36] plaintiff.

That the plaintiff is willing to assume that the said Commissioners have not wilfully perpetrated a fraud on her, taken advantage of her non-residence in order to lighten the burden of resident tax payers, and alleges that the defendant pursued the method of levying benefits on the 1917 assessment erroneously and thereby a fundamental error

was committed in her assessment of benefits without their knowledge. That said — amounts to a discrimination against and a confiscation of her property and is so gross that it amounts to demonstrable mistake and operates as a fraud. That the said Commissioners, instead of exercising their own judgment of value, accepted said excessive and discriminatory assessment, in violation of their duty to plaintiff.

The plaintiff was without the State during all the times herein complained of and had no knowledge until long afterwards of the gross error or fraud on her rights, and promptly sought relief when she learned of the same from the Board and failing in the same thereafter brought this suit.

That the said Commissioners should be estopped in equity and good conscience from setting up the limitation in Act No. 245, even if it is applicable, which the plaintiff denies for these reasons.

That said Commissioners' demonstrable mistake or fraud was unintentionally made and not known either to themselves or the plaintiff until after said period had run and to allow them now to avail themselves of it would be the assumption of rights based on fraud or [fol. 37] mistake which is contrary to the principles of equity.

Wherefore plaintiff prays for the relief heretofore prayed in her complaint in equity, the amendment thereto, as well as the causes herein set forth.

—— ——, Attorneys for Plaintiffs.

[fol. 38] IN THE CONWAY CHANCERY COURT

[Title omitted]

DEMURRER AND ANSWER

Comes the defendant and demurring generally and specially to the complaint of the plaintiff filed herein, and for cause, says:

(1)

That said complaint does not state facts sufficient to constitute a cause of action or to entitle the plaintiff to the relief prayed for.

(2)

That the said paragraphs severally and each of them contained and set out in the said complaint do not state facts sufficient to constitute a cause of action or to entitle the plaintiff to the relief prayed for. That said paragraphs are not numbered and that this demurrer is intended and goes separately and severally to each separate paragraph of said complaint, and the said defendants pray the judgment of this court on their demurrer on their behalf, and saving all their rights and waiving none of them, for answer to the complaint of the plaintiff, says:

[fol. 39] That they deny each and every allegation of said complaint specially and severally except such as are hereinafter admitted.

Admit that said lands alleged and described in the complaint are owned by the plaintiff, but deny that they are assessed in the sum of $15,780.00 as benefits for the construction of the road improvements in said district *in said District,* to be paid in twenty annual installments of $946.80, amounting in all to $18,936.00.

Deny that no notice was given or published in the locality where the lands were to be *effected* thirty days prior to the introduction in the General Assembly of the intention to apply for and pass the act creating said District, and deny that no notice thereof was exhibited in the General Assembly before same was passed; and deny that said act was passed in contravention of Sections 25 and 26 of Article V of the Constitution of 1874, and deny that the passage of said act, the assessment of benefits and the creation of a lien against plaintiff's property for the payment therefor was without plaintiff's knowledge, and deny that Section 26 was not complied with, and that if same was not but had been, that plaintiff would have had a better opportunity of ascertaining the proceedings against her land; and deny that if said proceedings had been under a general law, she would have had a more full and ample notice thereof than is provided in said act.

Deny that plaintiff had no notice or information of the passage of said special act No. 245, until long after the proceedings under said act had fixed a lien upon her said property as in said complaint [fol. 40] stated.

Deny that the defendant proceeded under said act to give a short notice for interested parties to appear of less than twenty days in the county court to hear objections as provided in said act. Deny that on that day the plans were approved, the commissioners filed assessments on July 19, 1919; deny the clerk dated notice June 17th, that said assessment of benefits was filed with the secretary of the Commissioners, and a copy in the clerk's office, open to inspection and that the Commissioners would on the 12th day of August, attend at the court house in Morrillton, Arkansas, for the purpose of hearing any complaint upon said assessment, and that the complaint of any assessment must be filed with the Secretary of the Commissioners in writing before the date of said hearing. Deny that said notice was published in the Conway County Unit on the — day of July, on the 30th day of July, on the 2nd day of August, August 6th and August 12th, and deny that the three last publications *was* within ten days of the date and not to be reckoned pursuant to the act. And deny that said notice and act required plaintiff to file her objection on or before August 11th, 1919, and deny that said notice was in fact or by computation under Section 9756 of Crawford & Moses Digest but eighteen days, and deny that said notice was not in compliance with said statute.

Deny that plaintiff had no actual notice of the proceedings, saw no copy of the newspaper and had no notice whatever of the formation of the District, the proceedings of the Commissioners adopting the plans, the orders of the court in approving same, nor the pro-

ceedings of the Commissioners in assessing her lands with benefits [fol. 41] for the construction of the improvements until long after said date when such proceedings were had.

Deny that said commissioners did not comply with said act and the provisions thereof and set down the description of the real estate in the assessment book, but merely set down the names of the owners and opposite the valuation, and opposite that the assessment of benefits without filling in the said book the property assessed, and deny that said assessment would not give information to land owners and especially the plaintiff of their property assessed. Deny that same was not in compliance with the statute, and deny that same was a jurisdictional requirement of the statute, and deny that the notice based thereon was void, and deny that since said assessment was investigated by the grand-jury, said assessment list has been filled in, and deny that same was not filled in until long after notice thereof had been given. Deny that plaintiff had no knowledge or information of a hearing; deny that constructive notice only was given her and that only for a period of eighteen days for her to file her complaint in the chancery court, controverting said assessments, and deny that she did not have an opportunity to avail herself of said remedy by a suit in chancery within ten days after August 12th.

Deny that plaintiff was not given due and timely notice before the assessment became a lien against her land, of a hearing as to the justice and equity of said assessment, and deny that she was given no such notice by the constructive notice and publication thereof, and deny the utmost time thereof was eighteen days, and deny that [fol. 42] said notice for said time was manifestly insufficient; and denies that the provisions of the statute authorizing the same and as carried out by the Commissioners, amounts to a denial of justice.

Deny that said assessment and the tax thereon as alleged in said complaint is a deprivation of her property contrary to the law of the land as guaranteed by Section 21 of Article 2 of the Constitution of 1874, and denies that same deprives her of her property without due process of law as guaranteed to her by Section 8 of Article 2 of the Constitution of 1874.

Deny that the only notice authorizing said lien and of the filing of said assessment and of fixing the time for the filing of said exceptions was that published in the Conway County Unit on July 23rd and July 30th, and denies that said notice is not such notice as is required to constitute due process of law within the meaning of the 14th Amendment to the Constitution of the United States.

Denies that said acts and proceedings amounted to — the State, through such agents, depriving plaintiff of her property without due process of law, and deny that such proceedings *is* void as in conflict with the 14th Amendment to the Constitution of the United States, and deny that the plaintiff, relying on same has a right to have declared void said assessment against her property.

Denies that plaintiff having no notice in fact of said proceedings of August 12th, 1919, she had no opportunity to take an appeal within ten days thereafter as provided by Section 21 of said act that [fol. 43] she might have taken had she known of said proceedings,

and denies that during the said ten days she was residing in her home in the city of Washington, in the District of Columbia, and had no knowledge or information of said proceedings until long thereafter.

And denies that the creation of said lien was of itself a deprivation of her property rights without due process, contrary to the provisions of the 14th Amendment to the Constitution of the United States, and deny that the said notice and the ten days given to bring suit in the chancery court to contest the assessment would be unreasonably short, amounting in all to only 28 days of constructive notice before her property was taken, and deny that the said ten days cannot be tacked on to the eighteen days' notice, and deny that the said notice did not give any information that such length of time would be given, and deny that said notice stated that "Any complaint of assessment of benefits or damages must be filed with the secretary of the Commisioners before the date of hearing", and deny that said notice was insufficient and only gave information of proceedings of August 12th; and deny that said notice did not give information of the creating of said District by special act of the General Assembly.

Deny that the notice prescribed in Section 20 of Act No. 245 is insufficient on its face to constitute notice to the plaintiff and other land owners of the assessment made against their property, and deny that said notice should give the description of the land and the owners thereof or reference to the acts of the legislature, proceedings [fol. 44] of court or any other source of information by which land owners reading same, would be notified that their lands were within the District assessed.

Deny that the giving of the notice of the filing of the plans required by Section 18 of said act, does not impart information of the land affected by said plans, and gives no reference to any act, map or order of court by which all lands affected could be identified, and deny that it was either necessary or reasonable to include such information in such notice.

And deny that said act by the publication of said notice thereby was not sufficient to constitute due process of law.

Deny that said act itself was passed contrary to the constitutional provisions that notice should be given of its introduction, and deny that the passage of said act without notice would constitute no notice, and deny that such notice required by said act is insufficient to constitute such a notice as is required by due process of law before a lien can be legally created against plaintiff's property, and denies that the meeting was not held on the 12th day of August at the Court House in the City of Morrilton by said Commissioners as required by said act.

Deny that said notice was insufficient to meet the requirements ofthe Constitution as to due process of law and proceedings conformable to the law of the land, and deny that the same is insufficient to meet the requirements of the 14th Amendment to the Constitution of the United States, forbidding any State or any agency [fol. 45] in any State to take property without due process of law.

And denies that plaintiff was not chargeable with notice of the

special act passed by the legislature, contrary to the Constitutional provisions of the notice of its introduction, and denies that her ignorance of law was a mistake of fact of which equity should give relief.

Deny that the said assessment of benefits against her property was excessive, unreasonable and discriminatory, and that she is entitled to relief in equity for the reasons set out in said complaint or any other reasons, and deny that the allegations of said reasons set out in said complaint are correct; and deny that the lands are for a basis of assessment, divided into six zones, according to distance from road, classing all lands in another district as in zone six. Deny that the lands of the plaintiff was assessed 100 per cent of its taxable valuation, and denies that her lands were reduced by encroachments of the river to 2,900 acres; and denies that the cutting of the timber from her said lands or any part thereof decreased its value in the sum of $35,000.00 or any other sum. and deny that she paid taxes upon an increased value or of said timber in the assessed valuation of 1917, and deny that her said assessment was increased in value in said year because of said timber thereon. Deny that the lands of plaintiff has a proportionally higher valuation. Deny that plaintiff's lands had been reduced thirty per cent at the time of the filing of the assessment of benefits, and deny that an assessment upon such benefits if they had been made would [fol. 46] have been fair or sufficient to cover the actual benefits received thereby. And deny that by reason thereof the plaintiff is assessed upon a basis of thirty per cent higher than other land in the District and higher than the value thereof.

Deny that plaintiff's lands in said District is composed of only about 300 acres of good land, comparable to the best lands in that vicinity, and deny that 150 acres is in the cypress brakes and sloughs and that 400 acres is low, wet bottom land of little value and that same could only be reclaimed by a large expenditure for levee and drainage purposes. Deny that there are no houses or other improvements of any considerable value upon said lands, and deny that $1,000.00 would be an excessive valuation for all the improvements thereon.

Deny that the commissioners of district did not take in to consideration the character and value of the land in assessing the benefits thereupon. And deny that the assessments against her lands are grossly discriminatory or in many instances much better lands than hers, lying within a levee district and protected from overflows are assessed for much less than her lands of less value, and denies that the improvements add nothing towards the drainage and protection of her lands. Denies that adjacent lands are assessed much less than hers, and denies that she is discriminated against in said assessments and denies that she is prepared to how upon final hearing, gross or inequitable discrimination against her property.

[fol. 47] Deny that the first information the plaintiff had of the passage of special act No. 245 and the assessment of benefits against her property was in January 1920 when she wrote to ascertain the amount of taxes due for the year 1919. And denies that in order

to avoid the penalties which would have been added against her land she paid the district $946.80 under protest.

Deny that plaintiff has frequently appealed to the commissioners of district for relief; and deny that the same unto her is denied.

Denies that the amounts paid for the assessments for 1919 are more than should be justly paid by her for several years, on a fair and equitable imposition of benefits, and denies that if the court should hold that her property is subject to assessment as having been benefited, that on the adjustment of the benefits in said district by the court, she should be given credit against future assessments for the amount paid in 1919.

Deny that the inclusion of her land in said district is arbitrary exercise of legislative power and void as such, and deny that the assessment of benefits whatsoever against her land for the construction of improvements provided in said act is arbitrary or without just basis and deny that her land is not and cannot be benefited by the improvements provided for in said act. Deny that the road running from Plummerville and its lateral is beneficial to the country they traverse and to the Town of Plummerville but are no benefit whatever to the present or future use of the plaintiff's lands; [fol. 48] and denies that it directs traffic from plaintiff's land: deny that the imposition of an assessment upon plaintiff's land results in taking plaintiff's property to pay improvement to other peoples property and to help construct roads in other parts of the county, which from their nature and future use would not be used by the owners or occupants of the plaintiff's lands. Deny that the commissioners have authorized a bond issue of $363,000 and have sold $226,000 and deny having paid an excessive and unlawful commission and have only received $207,308.23. Deny that the commissioners have paid for attorney's fees $5,630.00 — is excessive. Deny that should the court hold any of plaintiff's land has received any benefits and she should be taxed therefor, then that as a tax payer the district should be required to account for fees paid for bond sales or to attorneys.

Defendant further alleges by way of affirmative defense that said special act was legal and constitutionally passed, creating the said road district; that all provisions of law were fully complied with in the organization thereof and in the assessment of benefits; that the provisions thereof for notice and notices thereunder and all other proceedings had were reasonable, constitutional and not in contravention of any of the provisions of the Constitution of the State of Arkansas or of the United States; that the lands of plaintiff in said district was benefited by the construction of said improvement in the amount equal to and more than assessed against same; that the making of the assessment and levy and installments of taxes [fol. 49] thereon was in conformity of law, and that plaintiff's entire complaint is without equity.

Defendant further alleges by way of cross complaint that the respective assessment of benefits and the taxes imposed thereon against the various tracts and parcels of land of the plaintiff is legal, just

and is now long past due and wholly unpaid and constitutes a valid and subsisting lien against plaintiff's lands.

Wherefore, it is prayed that plaintiff's complaint be dismissed for want of equity, and that the defendant have judgment for its said taxes and installments against the benefits assessed against the various tracts of lands, and that same be declared a lien and that said lands be condemned and sold in the way and manner provided by law for said taxes, for the penalties allowed by law and for interest and cost and for all other proper relief.

J. W. Johnston, Strait & Strait, Attorneys for Defendants.

[fol. 50] IN THE CHANCERY COURT OF CONWAY COUNTY, ARKANSAS

[Title omitted]

DEMURRER AND ANSWER TO THE AMENDMENT TO THE COMPLAINT

Comes the defendant, Road Improvement District No. 5 of Conway county, and R. E. Bartlett, Sheriff of Conway county, and demurring to the amendment to the complaint filed in this cause for reason states:

(1) That said amendment as a whole does not state facts sufficient to constitute a cause of action or to entitle the plaintiff to the relief prayed for.

(2) That neither paragraph of said Amendment to the complaint states a cause of action against the defendants or entitles the plaintiff to the relief prayed for.

And the said defendants saving all their rights under the demurrer for their answer to said amendment:

Deny that said Road District No. 5 was arbitrarily created and that plaintiff's property is taxed disproportionately to other lands similarly located in relation to the improvement contemplated in said District.

Deny that said District is so arbitrarily created as to amount to a denial of the equal protection of the law to the plaintiff in the particulars alleged and set out in said amendment; and deny that ex-
[fol. 51] cept immediately adjacent to Plummerville no benefits can accrue to the lands situated South of Plummerville by the improvement of said road; and deny that plaintiff's 160 acres situated in Section 21 is approximately two and one-half miles from Plummerville; and deny that plaintiff's other land in said District is from three to five and one-half miles South and East of Plummerville; and deny that other lands situated an equal distance from Plummerville as are plaintiff's lands in Sections 22, 23 and 24, are arbitrarily excluded from said District; and deny that all equidistant in the opposite direction from Plummerville has equal benefits with plaintiff's lands.

Deny that plaintiff's land in said District are separated from the rest of the District by Gap Creek, lakes and bayous and the Missouri Pacific Railroad, and deny that the road in District No. 5 cannot be used from the lands of the plaintiffs without going to Plummerville, a distance of from two to five and one-half miles from her land; deny that lands South and West of Plummerville similarly located are not included in said District. Deny that said District extends eastwardly and westwardly only one and one-half miles to two miles or that if same does, that such fact arbitrarily includes a large area on the East side and excludes a large area on the west side similarly situated and benefited.

Deny that the lateral beginning two miles north of Plummerville is used as an excuse to include the area on the East side while a corresponding area on the west side is not included. Deny that no substantial work has been done on said lateral and that none is planned to be done, and deny that if same should be improved it would only [fol.52] be a benefit to lands adjacent to it; and deny that same would be of no benefit to plaintiff's land; deny that plaintiff's lands are not accessible to road without first going to Plummerville; and deny that said lateral cannot be reached from plaintiff's land without traveling about seven miles; and deny that same has no value whatever to plaintiff's lands and deny that same is equal value to lands south and west of Plummerville, and deny that for said reasons, or any of them the District is so arbitrarily created as to amount to a denial to the plaintiff of the equal protection of the law or to a taking of her property for public use without compensation, or of depriving her of her property without due process of law; deny that the defendant District did not comply with the provisions of Act No. 245 as alleged in said amendment.

Deny that on July 2, 1919, the District filed in the office of the Clerk of Conway County a document called "specifications, proposal, contract and bonds prepared by the Parks Engineering Company, which did not purport to be the plans adopted by the Board of Commissioners but only the plans submitted to it by the said Engineering Company; and deny that same did not show parts of said road to be graded, surfaced with rock, gravel or other hard material, and did not show an estimate of the aggregate cost of the construction of said improvement other than an addition of various estimates of cost for various quantities to be used in said improvement, and deny that same is not such an estimate as is contemplated by said Act, and deny that there were no plans adopted or purported to have been adopted by the Commissioners upon which the county court could [fol. 53] have acted by its order of July 16th; defendants alleges that plans and specifications were filed as required by law, and deny that said plans and specifications and those prepared by the Parks Engineering Company were not approved by the Highway Department. Deny that the plans filed with the Highway Department are radically different from the plans filed by the county clerk, and deny that those filed with the county clerk were not the plans approved by the Highway Department and contemplated by said Act.

Wherefore, having fully answered the said defendants pray the judgment of the court in their behalf.

—— ——, Attorneys for Defendant.

[fol. 54] IN CHANCERY COURT OF CONWAY COUNTY

[Title omitted]

DECREE FOR DEFENDANT

On this the 20th day of April, 1922, comes the plaintiff, Mrs. M. L. House, by her attorney, Hon. Jos. M. Hill; comes also the defendant by its attorneys J. W. Johnston and Strait & Strait; and this cause being a suit brought by the plaintiff against the defendant to declare the legislative organization of said District and the assessment of benefits against Plaintiff's lands situate therein made by the Commissioners, null and void and to enjoin the collection of all assessments levied upon the betterments fixed and assessed against the plaintiff's land within said district, coming on for hearing upon the complaint of the plaintiff and all amendments thereto, and upon the general and special demurrer and answer of the defendant thereto, and the court being well and sufficiently advised doth sustain said demurrer to all questions and matters raised by the complaint and amendments thereto except the question as to whether or not the Commissioners had abandoned the construction of the improvements contemplated upon what is commonly termed "the Shaw Bridge lateral" leaving the main road North of and near Plummerville and extending in an Eastwardly direction to the county line, and the question of whether or not the legislature acted arbitrarily in including plaintiff's land in the said District and excluding certain other lands alleged to have been specially benefited, to which ruling on said gen-[fol. 55] eral and special demurrer the plaintiff at the time excepted and saved exceptions and said cause coming on for hearing upon the questions and matters alleged in said complaint to which the said demurrer was overruled and not sustained as above set out, and the court being well and sufficiently advised, doth find the issues against the plaintiff and for the defendants and upon defendants' cross complaint asking judgment for the past due taxes the court also finds for said cross complainant.

It is therefore, by the court considered, ordered, adjudged and decreed, that the plaintiff's complaint herein, together with all amendments thereto, be and the same is hereby dismissed for the want of equity and that the said defendant, Road Improvement District No. 5 of Conway County, Arkansas, do have and recover of and from the said plaintiff, the said sum of $—, being the annual tax levied and assessed upon said assessed benefits for the year 1920, due in the year 1921, heretofore enjoined by the temporary restraining order issued in this cause by this court in the sum of $—, together with interest thereon at the rate of six per cent per annum

from the — day of ——, 1921, until paid; from all of which findings and rulings the plaintiff, Mrs. M. L. House, prayed and is hereby granted an appeal to the Supreme Court; and it is further ordered that upon the execution and filing with the clerk of this court a bond to be approved by him within 20 days from this date, conditioned as provided by law for appeals to the Supreme Court, and further conditioned as provided by law for payment of all damages which defendant may sustain by reason of the injunction, then [fol. 56] that pending a final hearing of this cause on appeal, execution upon said judgment for taxes as above set out, be and the same is hereby stayed, and in addition thereto the collection of all taxes penalties and costs for the year 1921, due in 1922, upon the lands of this Plaintiff to the said District be and the same is hereby enjoined and restrained until further order of this court, the Supreme Court, or any other court having jurisdiction herein or thereof.

[fol. 57] STATE OF ARKANSAS, ss:

IN THE SUPREME COURT

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House, in the City of Little Rock, on the 27th day, being the fourth Monday of May, A. D. 1922, amongst others, were the following proceedings, to-wit: On the 13th day of November, A. D. 1922, a day of said term:

IN SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER EXTENDING TIME

On motion, and for good cause shown, it is ordered by the Court that the appellees herein are allowed until the 10th of December, prox., in which to file their brief.

IN SUPREME COURT OF ARKANSAS, NOVEMBER TERM, 1922

[Caption omitted]

ORDER SETTING CAUSE FOR HEARING

March 19th, 1923.

This cause, having heretofore been noted for oral argument, is now by the Court set down for such argument on April 2nd. prox.

[fol. 58] IN SUPREME COURT OF ARKANSAS, NOVEMBER TERM, 1922

[Caption omitted]

ARGUMENT AND SUBMISSION

April 2, 1923.

This cause being regularly called come the parties thereto by their solicitors, and said cause is submitted upon the transcript of the record and the briefs filed and upon oral argument, and is by the Court taken under advisement.

IN SUPREME COURT OF ARKANSAS, NOVEMBER TERM, 1922

[Caption omitted]

DECREE

April 6, 1923.

This cause came on to be heard upon the transcript of the record of the chancery court of Conway county, and was argued by solicitors, on the consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said chancery court in this cause.

It is therefore ordered and decreed by the Court that the decree of said chancery court in this cause rendered be, and the same is hereby, in all things, affirmed with costs.

It is further ordered and decreed that said appellees recover of said appellant and Fidelity & Deposit Company of Maryland, surety in the supersedeas bond filed in this cause all their costs in this Court and the court below in this cause expended, and have execution thereof.

Wood and Hart, J. J. dissent.

[fol. 59] IN THE SUPREME COURT OF ARKANSAS, APRIL 16, 1923

No. 314

[Title omitted]

OPINION

HUMPHREYS, J.:

Appellant instituted this suit in the chancery court of Conway county against appellees attacking the validity of Road Improvement District No. 5 of Conway County, and the assessments of benefits against appellant's lands embraced within the district. The district

was created along with other districts in said county by Special Act No. 245, of the Legislature of 1919. The first ground upon which the validity of the Act itself is assailed is, that the notice to the property owners, whose lands were included in the district, provided for in the Act was not sufficient as to time, or upon its face, to apprise property owners of the burdens about to be laid upon their lands, and was a taking of appellant's property included in the district, without due process of law. This identical point was involved and determined adversely to the contention of appellant in her attack upon Road Improvement District No. 2 of Conway County, which is a companion case to this in many respects. We deem it unnecessary to reiterate what was said in that case bearing upon this point. The second ground of attack upon the validity of the district is, that it was arbitrarily created by the Legislature as evidenced first, by the [fol. 60] alleged exclusion of benefited lands from the district, and second, by the alleged inclusion of appellant's un-benefited lands in the district.

(1) The district, for the greater length thereof, is between seven and nine miles in width. It is about twenty miles in length. Plummerville is situated in the southwestern corner of the district and, generally speaking, the district lies toward the northeast from Plummerville and includes the town of Springfield, situated eleven miles northeast of said town. The main road of the district runs due north from Plummerville for a distance of three miles where it turns toward the northeast, running through Springfield and to the easter- boundary line of said district. A prong of the road also runs due north out of Springfield to the northern boundary line thereof. About three miles north of Plummerville a lateral runs in an easterly direction to the east boundary line of the district. From this description it will be readily seen that the boundary lines of the district immediately south and west of Plummerville are much nearer the main, improved road than the east boundary line. It necessarily follows that the lands adjoining the district south and west of Plummerville are nearer to the main, improved road than some of the lands east and southeast of Plummerville which were included in the district. Appellant makes the argument that because lands west and south of the district are nearer the main improvement than lands east and southeast thereof, which were included in the district, the district was arbitrarily created and, therefore, void. There are several reasons why this is not so.

[fol. 61] In the first place, Section 17 of the Act creating the district authorized the county court upon notice and hearing to extend the boundaries of the district so as to include any lands benefited by the improvement. The purpose of including a flexible provision of this kind in the Act was to preserve its validity in case a demonstrable mistake was made by the Legislature in establishing the boundary lines so as to exclude lands benefited by the improvement. The remedy of the property owners was not to impeach the validity of the district on account of exclusion of benefited lands but to move the inclusion of them.

Again, there is nothing in the Act creating the district, or any fact of which the court will take judicial notice, showing a demonstrable mistake or arbitrary action, on the part of the Legislature, in excluding lands from the district. The Act, itself, included the other lands excluded from District No. 5, of which complaint is made, in other improvement districts, and from aught that appears, under the general system of improvement, may have equitably apportioned the lands to the particular district in which they would receive local and peculiar benefits on account of trade relationships, markets, etc.

And again, this court is firmly committed to the doctrine that improved roads must necessarily have termani and improvement districts, boundaries. Hill v. Echols, 140 Ark. 479; Tatum v. Wallace, 146 Ark. 289.

(2) The south boundary line of said District No. 5, is the south line of Sections 19, 20, 21, 22, 23, and 24 in Tp. 6 N., Range 15 W., [fol. 62] in Conway County. A part of appellant's lands were located in Section 21 in said district. Appellant alleged and made proof that on account of Gap Creek and cypress brakes the only practical route from said lands in Section 21 to the improved roads in said district is to cross the south boundary line thereof and pass over lands not included in the district, and a part of which was nearer the improved road than appellant's lands. Appellant argues that this situation invalidates the Act creating the district under the rule announced in Heinemann v. Sweatt, 130 Ark. 70, and subsequently approved in Milwee v. Tribble, 139 Ark. 574; Johns v. Road Imp. Districts, 142 Ark. 73, and Ruddell v. Rutherford, 143 Ark. 49. The rule announced in those cases is, that when it appears from the face of the Act creating an improvement district, or from conditions or situations of which the court will take judicial knowledge, that lands of complaining owners are entirely separate from the roads to be improved by intervening lands excluded from the district, or by impassable obstructions or barriers, the inclusion of the lands thus separated renders the Act void because arbitrary and discriminatory. In the instant case the Act, itself, nor any impasse of which this court will take judicial notice separates appellant's lands in Section 21 from the improved roads in the district. On the contrary, none of the lands embraced in the district, according to the face of the Act and such facts as this court judicially knows, are separated from the improved roads by an empasse or intervening excluded lands. The Ruddell case, supra, which learned counsel so earnestly insist con- [fol. 63] trols the case at bar is not applicable because the impasse in that case was an island and navigable stream of which this court took judicial notice. The only obstructions between appellant's lands in Section 21, and the improved roads in said district are a small creek and cypress brake of which this court takes no judicial notice. The statute itself does not impose any burden on the lands included, but merely creates the district and fixes the boundaries. Adequate methods are provided for the ascertainment of actual benefits and burden of assessments, and the owners of property are given an opportunity to be heard, which constitutes due process of law. The

mere creation by the statute of the district as a public agency for the construction of a proposed improvement is a legislative, not a judicial, proceeding and does not present a judicial question further than the determination whether the statute is a valid enactment, and this must be determined from the face of the statute and matters of which the court may take notice. Greene County v. Clay County, 135 Ark. 301. Hence the facts upon which the Legislature is presumed to have based its determination as to the wisdom and propriety of the enactment cannot be reviewed by the courts. The federal cases, on which learned counsel for appellant rely, recognize this distinction. Houck v. Little River Drainage Dist. 239 U. S. 254; Myles Salt Co. v. Iberia Dist. 239 U. S. 478.

In the Houck case the court said: "Whether the expense of ascertaining the best method of reclamation should subsequently be reimbursed when final assessments were laid according to benefits ascertained to result from the execution of the final plan, presents a question of policy and not of power. These outlays for organization and preliminary surveys could as well be considered specially to con- [fol. 64] cern the district, as constituted, as highways or public buildings of plans for the same (whether consummated or abandoned) could be said to concern counties or towns. Further, it would seem to be clear that the State could appropriately provide for meeting the preliminary expense when it was incurred and could determine the manner of apportionment according to the interests deemed to be affected as they existed at the time. And in this view, it is not material to consider whether the area of the district might subsequently be extended, or what particular lands within it would be appropriated for ditches, reservoirs, etc., if a plan of drainage were adopted and carried out. To say that the tax could not be laid except as a result of such an inquiry would be to assert in effect that as a preliminary tax it could not be laid at all. We knew of no such limitation upon the State power."

The validity of the assessment of benefits against appellant's lands embraced within the district and the right to collect same are assailed upon a number of grounds, all of which, except one, were decided adversely to appellant's contentions in her attack upon the validity of the assessments and the right to collect same in the case of Mrs. M. L. House vs. Road Imp. Dist. No. 2 of Conway County, et al. submitted as a companion case with the case at bar. In order to avoid repetition we refrain from discussing these points again. One ground of attack is made upon the validity of the assessments of benefits and the right to collect same against the lands in the instant case which was not made in the case referred to. It is alleged that the commissioners abandoned the construction of a lateral [fol 65] beginning about two miles north of Plummerville and running east to the eastern boundary line of the district and known as Shaw's Bridge lateral, or Caney Valley lateral. It is contended that the elimination of that lateral was a substantial departure from the improvement designated by the Legislature. The lateral in question was about eight miles long, and under numerous decisions of this

court was an essential part of the improvement contemplated by the Legislature, and the elimination thereof would be a material change in the plans, having the effect of avoiding the assessment against the lands in the district for its construction. Phillips v. Tyronza & St. Francis Road Imp. Dist., 105 Ark. 487. The trial court found that the lateral in question had not been abandoned by the commissioners. The record reveals that from thirty-five to forty per cent. of the work on this lateral has been done, and that the commissioners intend to complete it along with the other portions of the road when the finances of the district will justify them in doing so. Each commissioner gave testimony to that effect. The only testimony appearing in the record tending to show an abandonment of the lateral is unauthorized letters written by two of the commissioners of the State Highway Department in an effort to procure State and Federal aid. The letters indicated a purpose on the part of the commissioners to abandon the lateral, but we do not regard them as conclusive upon the point. The commissioners who signed the letters testified they did so without any authority from the board and that they were entirely unofficial. The finding of the [fol. 66] chancellor to the effect that the commissioners had not abandoned the construction of the lateral is in accordance with the weight of the testimony.

No error appearing, the decree is affirmed.

Justices Wood and Hart dissent.

[fol. 67] IN THE SUPREME COURT OF ARKANSAS, APRIL 16, 1923

No. 317

[Title Omitted]

DISSENTING OPINION

HART, J.:

What was said in the dissenting opinion in the case of Mrs. M. L. House v. Road Improvement District No. 2 of Conway County applies with equal force to the facts presented by the record in this case, and need not be repeated here.

There is another phase of this case which in our judgment requires us to voice our dissent in writing. In this case the majority of the court has announced the rule to be that it is only when it appears from the face of the act creating an improvement district or other facts of which the court may take judicial knowledge, that the courts will review the action of the Legislature arbitrarily including lands in such district. It is true that in the cases cited in the majority opinion it appeared from the face of the act that they were arbitrary

and discriminatory and the court so stated in the opinion. This was but the statement of a fact as it appeared from the record and by no means constituted or was intended to constitute a holding that the courts would not review the action of the Legislature in establishing an improvement district however arbitrary it might be, unless that fact was shown on the face of the statute itself, or by facts of which [fol. 68] the court would take judicial knowledge. In cases of this sort the courts are not concerned about the method of proof. They are only concerned about whether the proof has been made by satisfactory and competent evidence. The general rule is that when owing to peculiar or extraordinary facts established by satisfactory and competent evidence the usual presumption in favor of the legislative act has been overcome, the courts will interfere to prevent an illegal exaction from the land owner and a virtual confiscation of his property. If the Legislature has no power to arbitrarily include land in an improvement district, the courts should interfere and grant relief when that fact is shown by any competent and satisfactory evidence.

It would seem that the majority opinion by necessary implication overrules the salutary principles of law announced in Louisiana & Arkansas Railway Co. v. State, 85 Ark. 12. In that case the court held that a legislative determination that a station should be erected and maintained at a certain point is conclusive unless the courts can declare as a matter of law that such determination is arbitrary and unreasonable. In that case proof was offered and rejected in the court below to show that there was no public necessity for the station and that the requirements of the legislation were so arbitrary and unreasonable as to demand a judicial review of the question. The court held that the rejected evidence was competent and that for the court to refuse a consideration of it would be to deny the railroad company the equal protection of the law and would in effect be [fol. 69] depriving it of its property without due process of law. In discussing the question the court referred to the fact that the legislature has the power to determine for itself the boundaries of a local improvement district, but that the court had held that the power when arbitrarily and unreasonably exercised is not beyond judicial control.

The court approved the doctrine stated by the Supreme Court of the United States in Norwood v. Baker, 172 U. S. 269. "But the power of the Legislature in these matters is not unrestricted. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go inconsistently with the citizen's right of property."

The court said that this principle was applicable in the station case. Continuing the court said that it is a question primarily for legislative determination and that determination should not be disturbed by the court unless the power has been exercised without reason. We see no reason why the arbitrary action of the legislature might be shown by any competent proof in that case and limited to facts of which the court might take judicial knowledge in the present case. It may not be impertinent to add that no reason is attempted to be given for such limitation in the majority opinion.

The principle upon which the arbitrary action of the Legislature

in matters of taxation and special assessment may be reviewed by the court is well stated in Stuart v. Palmer, 74 N. Y. 183. In discussing [fol. 70] the subject Judge Earl speaking for the court said:

"The Legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these "without due process of law" has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty or property. This the Legislature cannot do nor authorize to be done. "Due process of law," is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. (Weimer v. Bruenbury, 30 Mich. 201.) This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."

With reference to the facts showing the arbitrary action of the Legislature but little need be said. The undisputed facts show that the lands of appellant are separated from direct connection with the [fol. 71] proposed road by lakes and brakes which are impassible. The evidence shows that it would not be practical to construct bridges over this impassable way and the only practical route for appellant to use the improved road is to leave her land and go upon adjoining lands in order to reach the road.

This brings the case directly within the rule announced in Ruddell v. Rutherford, 145 Ark. 48, and other cases of like character.

We concede the general rule to be that if the legislature has fixed the boundaries of the district and paid the special tax or provided for a subordinate agency to do so, its action must in general be deemed conclusive. To invoke the intervention of a court against the result of its conclusion is to invoke judicial authority to give its judgment controlling effect over that of the legislature in a matter of the apportionment of a special tax, and this can only be done where the legislative action is manifestly colorable and arbitrary. This is the basis of our holding in Ruddell v. Rutherford, supra.

In that case the legislature eliminated Sec. 18, and thereby determined that it was not benefited by the improvement. It included Sec. 19 in the district, thereby concluding that it was benefited. It appeared from a map introduced in evidence that it was impractical to go from Sec. 19 to that part of the district where the improved road was without passing through Sec. 18. Hence the statute was held to be arbitrary and discriminatory on its face.

The court was not concerned about the method of proof. Because

the act on its face was discriminatory was not the fact which gave [fol. 72] the court jurisdiction. The arbitrary and discriminatory action of the legislature was what made the exception to the general rule and gave the court jurisdiction in the premises. This is illustrated by the case of Little Rock v. Katzenstein, 52 Ark. 107.

In that case the court held that the action of the city council in including property in an improvement district is conclusive of the fact that it is adjoining the locality to be affected except when attacked for fraud or demonstrable mistakes.

The court said that a demonstrable mistake of fact, meaning by this expression, a mistake of fact as to the existence of which there was no room for doubt. If no such limits exist the power of local assessments would be but another means for arbitrary exaction and in such cases the wrong must always be open to correction.

We also dissent from that part of the opinion which holds that the action of the legislature in fixing the boundaries of the district was not arbitrary. We concede that the members of the legislature are presumed to have a general knowledge of the geography as well as the topography of the State. They are supposed to act upon this general knowledge and upon information furnished by the committees and other agencies selected by it. All these are evidences upon which the legislature acts. But here again there is a well known exception to the general rule and that is that the legislature can not act in an arbitrary, discriminatory manner in fixing the boundaries of a district.

[fol. 73] In concluding this discussion on this branch of the case the majority opinion gravely adds that this court is firmly committed to the doctrine that improved roads must necessarily have termini, and the improvement districts, boundaries. This is so in the very nature of things, but it does not follow that the legislature can not act arbitrarily in fixing the boundary without its action being reviewed by the courts. There, as here, the testimony is all one way and shows that the legislature acted arbitrarily and in a discriminatory manner in fixing the boundaries of the district. The court should declare as a matter of law that the creation of the district was invalid and any assessments levied under it an illegal exaction. To hold otherwise is to deprive the landowner of his property without redress.

Justice Wood concurs in the views here stated.

[fol. 74] In Supreme Court of Arkansas, November Term, 1922

(Caption omitted)

Order Enlarging Time

April 30, 1923.

The appellant having filed a petition for rehearing within the time allowed by law, now prays for time in which to file a supporting

brief; and said appellant is allowed by the Court one week from date in which to file such brief.

[fol. 75] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

MOTION FOR REHEARING—Filed Apr. 28, 1923

Comes the appellant and asks that its motion for rehearing filed in her suit against Road District No. 2 determined with this one be taken as also filed herein, and alleges that the Court in determining this case adopted on the questions of due process the discussion and determination of those issues in the No. 2 case apply equally to this case.

Further, the appellant without acquiescing in any other part of the opinion, alleges that there is an outstanding error in this opinion to which this motion is directed as follows, to-wit:

The Court holds that the rule announced in the cases cited is that when it appears from the face of the Act creating an improvement district, or from conditions or situations of which the Court will take judicial cognizance that lands of complaining owners are entirely separated from the roads to be improved by intervening lands excluded from the district, or by impassable obstructions or barriers the inclusion of the lands thus separated renders the act void, because arbitrary and discriminatory, but held that in the instant [fol. 76] case neither the Act itself nor any impasse of which the Court will take judicial notice separates appellant's land in Section 21 from the improved roads in the district and for that reason declined to apply the rule announced by the Court in Ruddell v. Rutherford, 145 Ark. 49, and distinguishes this case from that one on the ground, that the Ruddell case was not applicable because the impasse in that case was an island and navigable stream, of which the Court took judicial notice, whereas the impasse in this case was not of such character that the Court took judicial cognizance of it, but was established by evidence.

The appellant alleges that the distinction drawn is erroneous and contrary to the decisions of this Court.

Wherefore for the reasons alleged in the Motion in the No. 2 case and the reasons herein set forth, the appellant prays for a rehearing and that these questions be reconsidered.

Hill & Fitzhugh, Attorneys for Appellant.

I, Joseph M. Hill, certify that I am one of the attorneys for the appellant in the foregoing motion for rehearing which is filed in good faith and because I believe the statements therein stated are correct.

Jos. M. Hill.

[File endorsement omitted.]

[fol. 77] IN THE SUPREME COURT OF ARKANSAS, NOVEMBER TERM, 1922

(Caption omitted)

ORDER OVERRULING MOTION FOR REHEARING

May 21, 1923.

Being fully advised, the petition for rehearing filed herein is by the Court overruled; and the opinion heretofore handed down is by the Court amended.

[fol. 78] STATE OF ARKANSAS, ss:

IN THE SUPREME COURT

CLERK'S CERTIFICATE

I, W. P. Sadler, Clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings, as called for by the stipulation filed herein by the Attorneys of Record, in the case of Mrs. Mary L. House, Appellant, against Road Improvement District No. 5 of Conway County, Arkansas, and R. E. Bartlett, Sheriff, and also of the opinion of the court and of the dissenting opinion rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this June 16, 1923.

W. P. Sadler, Clerk Supreme Court of Arkansas, By ——, Deputy Clerk. (Seal of the Supreme Court of Arkansas.)

[fol. 79] IN THE SUPREME COURT OF THE STATE OF ARKANSAS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 4, 1923

Now comes Mrs. M. L. House, Petitioner herein and Plaintiff in Error, by her attorneys, Joseph M. Hill and Henry L. Fitzhugh and in connection with her petition for writ of error makes and declares the following assignment of errors, to-wit:

First. The Court erred in deciding that the notice authorized by Act 245 of the General Assembly of 1919, which notice provided for a publication once a week for two weeks of the hearing upon th

assessments of benefits levied against real property in the district, and which notice in this case was published in a weekly newspaper in Conway County, Arkansas, in its issues of July 23rd, and 30th, 1919, advising all persons to file their objections to their assessments in writing before August 12, 1919, and stating upon which date the Commissioners would hear and determine such objections so filed in writing before said date, was due process of law as guaranteed in the Fourteenth Amendment to the Constitution of the United States.

Second. The Court erred in deciding that the notice in the form prescribed by Section 20 of Act 245 of 1919, which is as follows:

"Notice of the Assessment of Benefits in Road Improvement District No. — of Conway County, Arkansas

Notice is hereby given that the assessment of benefits and damages in Road Improvement District Number — of Conway County has been completed and is on file with the secretary of said commissioners, and is open for inspection, and a copy of said assessment of [fol. 80] benefits and damages is on file in my office and open to inspection and that the said commissioners for said district will on the — day of ——, ——, attend at ——, Conway County, for the purpose of hearing any complaints against any of said assessments of benefits or damages.

Any complaint of any of said assessment of benefits must be filed with the secretary of said commissioners in writing before the date of said hearing,"

and which notice was given in the above form in this case, said form being filled in by inserting the number of the district, the name of the clerk and the date and place of the hearing, constituted such notice as complied with the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Third. The Court erred in deciding that the system of levying special assessments as pursued by the commissioners of the defendant district acting under said Act 245 of 1919, when applied to the assessment of the appellant's property was valid, instead of holding the same to be arbitrary under the facts herein and in not holding the same to be arbitrary under the facts herein and in not deciding that the said action of the Commissioners in applying the system which they did apply under authority of said Act 245 amounted to taking the plaintiff's property without due process and deprived her of equality before the law.

Fourth. The Court erred in deciding that said Act 245 of 1919, creating the defendant district was not an arbitrary act of the Legislature in that it excluded benefited lands and included lands not benefited, thereby taking appellant's property to pay for public improvements without compensation and depriving her of her property without due process of law.

Fifth. The Court erred in deciding that Act 245 of 1919, creating the defendant district was not an arbitrary act of the Legislature in that it excluded benefited lands and included lands, if benefited at all, less than excluded lands similarly situated to appellant's land, [fol. 81] and if the appellant's lands were benefited, necessarily the excluded lands similarly situated were benefited, thereby denying the appellant equal protection of the law and taking her property without due process.

Sixth. The Court erred in deciding that notwithstanding the evidence established that part of appellant's lands were inaccessible to the improved road without going outside of the district and through lands nearer the improved roads than her land, which lands were not included in the district, because it held that the Court could not decide that the action of the Legislature in creating the district including her lands was arbitrary, and that such action deprived plaintiff of her property without due process, and denied her equal protection of the law, as it held that it could only so decide when the facts so appeared from the face of the Act itself, or from facts of which the Court took judicial notice.

By reason whereof, this petitioner and plaintiff in error prays the decision of the Supreme Court of Arkansas may be reversed and justice done.

Done this 4th day of June, 1923.

Joseph M. Hill, Henry Fitzhugh, Attorneys for Petitioner and Plaintiff in Error.

[File endorsement omitted.]

[fol. 82] IN THE SUPREME COURT OF THE STATE OF ARKANSAS

[Title omitted]

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed June 4, 1923

To the Honorable E. A. McCulloch, Chief Justice of the Supreme Court of the State of Arkansas:

Comes Mrs. M. L. House, the appellant in an action lately pending in this Court, wherein she was the appellant and Road Improvement District No. 5 of Conway County, Arkansas, and R. E. Bartlett, Sheriff, were the appellees, and represents that on the 21st day of May, 1923, final judgment was entered by the Supreme Court of Arkansas, affirming the decree of the Conway Chancery Court, in a suit in equity wherein said appellant was the plaintiff, and said appellees herein named were the defendants, wherein her complaint in equity was dismissed with a judgment against her for costs and the taxes sought to be enjoined.

That this was a complaint in equity filed by her, as property owner in Road Improvement District No. 5 of Conway County, Arkansas, wherein an assessment of special benefits amounting to $15,780.00 had been levied against her property in said district; that said district was created under Act 245 of the General Assembly of 1919. That said Act provided for a notice to be given by the Commissioners after they made their assessments of a hearing of any objections thereto, and provided for two weeks' notice to be given by publication in a weekly newspaper, and for said objections to be filed in writing prior to the date set for said hearing; that said notice was given as prescribed in said Act and was published for only two weeks, and said notice was in a form which did not mention the Act under which said Commissioners were proceeding, and did not describe the boundaries of the District, the location thereof of the lands therein to be affected, nor persons therein to be affected. [fol. 82½] That the appellant was a non-resident of the State of Arkansas, and was residing in the City of Washington, D. C. during all the time proceedings were had under said Act and did not learn of said proceedings until long thereafter.

That her complaint in equity alleged that said notice was not in accordance with due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and was not in form sufficient to convey notice as required by said due process provision of said Amendment, and the defendant specially set up her right and immunity to said levy of taxes against her land without due and proper proceedings in accordance with the law of the land, and she denied the proceedings had were in accordance therewith.

She further alleged that the assessment as made by the Commissioners pursuant to the terms of the Act were arbitrary and that the system which they pursued in assessing her property placed upon her property a greater burden than upon similar property similarly situated, and is discriminatory, and denied her the equal protection of the law and resulted in taking her property without due process of law.

Furthermore the appellant alleged in her said complaint that the said Act of the General Assembly creating said defendant district was arbitrary in that it included her land in said district and did not include other lands which were benefited by said improvement, and that her lands if they had any benefit whatever from the contemplated improvement were less benefited than other lands similarly situated nearer to the improved road which was excluded from said district, and furthermore she alleged that part of her lands which were assessed are so situated that they were inaccessible to the improved road, except by going without the District, traveling through land situated nearer to the improved roads than her lands which were not included in said District, in order to reach the improved road and that she offered evidence which sustained these [fol. 83] allegations and which evidence the Supreme Court found did sustain said allegations, but for reasons given in its opinion

said Supreme Court decided that it could not afford the appellant relief.

That the decision of the Conway Chancery Court was against her contentions and denied her the rights and privileges which she specially set up and claimed under the Constitution of the United States and the Supreme Court did, on the said 21st day of May, 1923, affirm said decision.

Your Petitioner alleges that said decision denies to this appellant the equal protection of the laws and takes her property without due process; and your petitioner further avers that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors filed herewith.

Wherefore, your petitioner prays that a writ of error may be issued in this cause from the Supreme Court of the United States to the Supreme Court of Arkansas, for the correction of errors so complained of, and that a transcript of all of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court, may be sent to the Supreme Court of the United States as provided by law.

Dated this 4 day of June, 1923.

Joseph M. Hill, Attorneys for Petitioner and Plaintiff in Error.

Upon the consideration of the above and foregoing petition for writ of error it is ordered that said writ of error issue upon the execution by the appellant, Mrs. M. L. House, of a bond in the sum of $3,000.00, said bond to be conditioned as prescribed by the law and practice in such cases and such bond when approved to act as a supersedeas.

Given under my hand and seal this, the 4 day of June, 1923.

E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 84] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

BOND ON WRIT OF ERROR—Filed June 4, 1923 [for $3,000.00; approved, McCulloch, J.; omitted in printing]

[fol. 85] [File endorsement omitted.]

[fol. 86] WRIT OF ERROR—Filed June 4, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Chief Justice and Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings and in the affirmance of the decree of the Conway Chancery Court, as also in the rendition of the judgment of a plea which is in the Supreme Court of Arkansas before you, being the highest Court of law or equity, of said state in which a decision could be had in the suit between Mrs. M. L. House, appellant, and Road Improvement District No. 5, and R. E. Bartlett, Sheriff, of Conway County, Arkansas, appellees, wherein was drawn in question the validity of a statute of and an authority exercised under said state on the ground of the statute and authority exercised under it being repugnant to the Constitution of the United States and the decision was in favor of the validity of the statute and the act of the state thereunder, and wherein a right, title, privilege and immunity was claimed by the said Mrs. M. L. House under the Constitution of the United States, and the decision was against the right, title, privilege and immunity especially set up and claimed under said Constitution, a manifest error hath appeared to the great damage of the said Mrs. M. L. House as by her complaint it appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this, the 4 day of June, 1923.

Sid B. Redding, Clerk of the United States District Court for the Eastern District of Arkansas, By W. P. Feild, D. C.
(Seal of the United States District Court, Eastern District of Arkansas.)

Allowed by E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 87] STATE OF ARKANSAS, ss:

SUPREME COURT

CERTIFICATE OF LODGMENT

I, W. P. Sadler, clerk of the said court, do hereby certify that there was lodged with me as such clerk on June 4, 1923, in the matter of Mrs. Mary L. House, versus Road Improvement District No. 5 and R. E. Bartlett, Sheriff of Conway County, Arkansas—

1. The original bond of which a copy is herein set forth.

2. Four copies of the writ of error, as herein set forth, one for each defendant, and one to file in my office.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this June 16th, 1923.

W. P. Sadler, Clerk Supreme Court of Arkansas, By ——, Deputy Clerk. [Seal of the Supreme Court of Arkansas.]

[fol. 88] IN SUPREME COURT OF ARKANSAS

CITATION AND SERVICE—Filed June 16, 1923

The United States of America to Road Improvement District No. 5 of Conway County, Arkansas, and R. E. Bartlett, Sheriff:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of Arkansas, wherein Mrs. M. L. House is plaintiff in error, and Road Improvement District No. 5 of Conway County, Arkansas, and R. E. Bartlett, Sheriff, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the hand and seal of the Honorable, the Chief Justice of the Supreme Court of Arkansas, this 4 of June, 1923.

E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas. Attest: W. P. Sadler, Clerk of the Supreme Court of Arkansas, By J. H. Campbell, D. C. [Seal of the Supreme Court of Arkansas.]

We acknowledge receipt of copy of attached citation, and waive formal service thereof.

Given under our hands this 15th day of June, 1923.

J. W. Johnston, Attorney of Record for Road Improvement District No. 5 of Conway County, Arkansas, and R. E. Bartlett, Sheriff.

[File endorsement omitted.]

[fol. 89] UNITED STATES OF AMERICA, ss:

SUPREME COURT OF ARKANSAS

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings, as called for in the stipulation filed herein, in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this June 16, 1923.

W. P. Sadler, Clerk Supreme Court of Arkansas, By ——, Deputy Clerk. [Seal of the Supreme Court of Arkansas.]

Costs of Suit

Costs in chancery court	200.00
Costs in Supreme Court	56.50
Costs, pursuant to writ of Error	28.00

Paid by Hill & Fitzhurgh for Plaintiff in Error.
Attest: W. P. Sadler, Clerk Supreme Court.

Endorsed on cover: File No. 29,694. Arkansas Supreme Court. Term No. 384. Mrs. M. L. House, plaintiff in error, vs. Road Improvement District No. 5 of Conway County, Arkansas, and R. E. Bartlett, sheriff of Conway County, Arkansas. Filed June 22nd, 1923. File No. 29,694.

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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1923

MRS. M. L. HOUSE, PLAINTIFF IN ERROR,

vs.

ROAD IMPROVEMENT DISTRICT NO. 5 OF CONWAY COUNTY, ARKANSAS, AND R. E. BARTLETT, SHERIFF, OF CONWAY COUNTY, ARKANSAS.

STATEMENT

This case presents all of the questions which are presented in the companion case submitted with it of Mrs. M. L. House vs. Road Improvement District No. 2 of Conway County, with additional questions presented herein, wherein the Judges of the Supreme Court divided three to two as to whether the action of the Legislature was so arbitrary in the creation of this District that it amounted to taking of the plaintiff's property without due process of law.

In order to save a duplication of work for court and counsel, we are serving counsel in this case with our brief in the No. 2 case, as well as the brief in this case and will merely call attention herein to the differences between this case and the No. 2 case in so far as the questions heretofore discussed are concerned and will present fully the questions that are peculiar to this case.

Act No. 245 of 1919 created four road districts in Conway County. The procedure in each District is the same, the Act specifying the territory embraced in each District and creating the District for it, the balance of the Act being common to all of them.

Therefore the form of notice in this case is identical with the form of notice in the No. 2 case, each being a copy of the form of notice specified in the Act. The notice here given is copied at page 1; it is dated July 21, 1919, and calls for a hearing on the 12th day of August at the county court house, of Conway County, without specifying its location, and states that any complaint of any assessment must be filed with the Secretary of the Commissioners in writing before the date of the hearing.

This notice was published in the Conway County Unit on July 23rd and July 30th; these being the only official publications, as the Act provides that the last shall be ten days before the day of hearing, but in addition to these official publications, it was also published August 2, 6 and 12th. (R. p. 6.) Computing the notice as prescribed by the statute there were 18 days actual notice given (R. p. 6).

This District proceeded, as did the No. 2 District, by taking the 1917 assessment as the basis of valuation. This District created six zones and classed all lands which were in another District as in the 6th zone and so classed the plaintiff's land and assessed it at 100% of its county valuation (R. p. 9).

Mrs. House' entire property was assessed on the 1917 assessment at $43,030.00 and was reduced to $30,320.00, which reduction was entered of record on June 12, 1919 (R. p. 10). The assessment in this case was made by the Commissioners on July 19, 1919 (R. p. 6). Therefore the 1917 assessment containing the reduced valuation was of record one month and one week before this assessment was made on the 1917 assessment as the basis.

The plaintiff's land in this district was 960 acres; of this, 300 acres was good land, comparable to the best in the vicinity in value; 150 acres in cypress brakes and sloughs, and 400 of low, wet, bottom land of little value, and could only be reclaimed by the expenditure of large sums of money for levee purposes; there were no houses of considerable value on the land. $1,000.00 would be an excessive valuation for all the improvements (R. p. 10).

The allegations as to the discrimination are the same in this case as in the No. 2 case. In effect being, that in many instances much better land than the plaintiff's and lying within the levee district, protected from overflows, are assessed much less than her lands of less value are assessed. That other lands immediately adjacent to hers and of like character and value are assessed much lower than hers (R. p. 10).

These additional questions were presented in this case: It is alleged, and a demurrer to these allegations was sustained, that the inclusion of the plaintiff's land in the District was an arbitrary exercise of legislative power and void as such because the assessment of any benefits whatever against her lands for the construction of the im-

provement provided in the Act is arbitrary and without any just basis, as her land situated in the District is not, and cannot be benefited by the improvement provided in the Act.

That the improvement provided in the Act is for the construction of a road beginning at the town of Plummerville and running thence in a north-easterly direction to the town of Springfield and continuing in a general north-easterly direction to the Conway-Faulkner County line, and for a road beginning at Springfield and running in a genaral northerly direction, and a lateral beginning about two miles north of Plummerville and running easterly to the Conway-Faulkner County line. That Plummerville is two miles from her land and the lateral is two miles from her land. Her land is southeast of Plummerville.

That between the lateral and her land lies the main line of the Missouri-Pacific Railroad and the public road to be improved in District No. 2 running from Plummerville east to Menifee. That all trade, traffic and other communication from the defendant's land and its vicinity goes either directly to Plummerville or to some point on said Road No. 2 to reach Plummerville, and there is no communication between her lands in a business, or in any other way, with the road running north from Plummerville. That the road running north from Plummerville and its laterals are beneficial to the country which they traverse and to the town of Plummerville, but are of no benefit whatever to the present or future use of plaintiff's land, and that the imposition of assessments on plaintiff's land results in taking her property to pay for improvements on other people's property, and to help construct roads in other parts of the county which from their nature and future use would not be used by the owner or occupants of plaintiff's land (R. pp. 11, 12).

This allegation is amplified in an amendment to the complaint wherein it is stated that except immediately adjacent to Plummerville that no benefit can accrue to the land situated south of Plummerville by the improvement of said road. That the plaintiff has 160 acres of land situated in Section 21, the nearest part thereof being approximately two miles and the furtherest 2½ miles from Plummerville south and east of said town. That the remainder of the plaintiff's lands are situated in Sections 22, 23 and 24—a distance from 3 to 5¼ miles south and east of Plummerville. That the District extends only a distance of 1¼ miles (a typographical error

makes it read 2½) south and west of Plummerville, and lands situated equidistant from Plummerville south and west thereof as are the lands of plaintiff in Sections 22, 23 and 24, are situated south and east of Plummerville, are arbitrarily excluded from said District; and if the plaintiff's land has any benefits from the said District all land equidistant in the opposite direction from Plummerville has an equal benefit, and no burden is placed upon same. (R. p. 14).

Plaintiff further alleged that her lands in the District are separated from the rest of the District by Gap Creek, lakes and bayous and the Missouri-Pacific Railway and the improved roads in District No. 2 and that the roads in District No. 5 cannot be used from the lands of the plaintiff without going to Plummerville, a distance of from 2 to 5½ miles from her land, and lands similarly located south and west of Plummerville are not included in said District and there is access from those lands to the roads of said District.

That the District extends easterly from the improved road at Plummerville a distance of 7½ miles, whereas on the west side where there will be equal benefit from the improvement of said road, the District extends from 1½ miles, thereby arbitrarily including a large area on the east side and excluding a large area similarly situated and benefited on the west side, if the said area on the east side is benefited, from said District (R. p. 14).

It is further alleged that access cannot be gained to the improved roads from plaintiff's land without going out of the District and traversing land that is not included in the District, but nearer to the improved road than her land (R. p. 14, 15).

The trial court sustained a demurrer to all of the allegations of the complaint, except on the questions as to whether the Commissioners had abandoned the construction of the Shaw's Bridge lateral and the question whether the Legislature acted arbitrarily in including plaintiff's land in the District and excluding other lands (R. p. 27).

The attack on the validity of the assessment based on the allegation that the Shaw's Bridge lateral had been abandoned presented a matter of construction of the State law and prior decisions of the court on that subject and is not subject of review here, and hence the evidence on that subject is not preserved.

The testimony in regard to the arbitrary act of the Legis-

lature was preserved and the substance of it is set forth in the stipulation (R. p. 2).

The testimony introduced and heard on the issue as to the arbitrary action of the Legislature was in substance as follows: "A map was introduced in evidence showing the lines of the District and the roads to be improved therein; a reduced copy of it is attached as "Exhibit A" and explanatory evidence of said map to the effect that the physical conditions on either side of the improved road were similar, and that the physical conditions southeast of Plummerville were the same as at an equidistant southwest thereof, and testimony was adduced tending to show that the plaintiff's lands in Sections 21 and 22, township 6 north, Range 15 west were separated from the improved roads, the nearest point upon the improved roads, the nearest point upon the improved roads being the town of Plummerville, by Gap Creek and cypress brakes and swamps.

That the only practical route of travel from said Sections 21 and 22 to reach Plummerville is to pass without the District and to go south into Section 28 and then strike a road leading into Plummerville, through said Section 28 and through Section 29 and Section 30, which said Sections 28, 29 and 30 are out of the District and pass back into the District in Section 19, in which Plummerville is situated, or go south without the District into Section 28, and strike another road leading east through Sections 28, 27 and 26 to Menifee, which said Sections 28, 27 and 26 are without the District and from Menifee to travel the public road of District No. 2 into the town of Plummerville and then reach the improved road of District No. 5; that there is no feasible or practicable route, owing to the topography of the land and the physical condition of the creeks, brakes and swamps, to reach the improved road in District No. 5 from said Sections 21 and 22, without excessive expense in bridging and constructing embankments, other than through said routes aforesaid. A map of said District, which was introduced in the trial of this cause, is attached hereto and marked "Exhibit B."

That testimony was introduced by defendant District tending to controvert testimony offered by appellant on this issue that the Chancellor decided this issue in favor of the District, but the Supreme Court in passing on same, has this to say: "The south boundary line of said District No. 5 is the south line of Sections 19, 20, 21,, 22, 23 and 24 in Twp. 6-N., Range 15 W., in Conway County. A part of appellant's land were located in Section 21 in said District. Appellant alleged

and made proof that, on account of Gap Creek and cypress brakes, the only practical route from said lands in Section 21 to the improved roads in said District is to cross the south boundary line thereof and pass over lands not included in the District, and a part of which was nearer the improved road than appellant's lands." (R. pp. 2, 3.)

Hence we have the statement of the majority of the court that the plaintiff made proof of the allegations that on account of Gap Creek and cypress brakes the only practicable route from plaintiff's lands to the improved road in the District is to cross the south boundary of the District and pass over lands not included in the District, part of which are nearer the improved roads than plaintiff's lands, and we have a statement in the dissenting opinion as follows:

"The undisputed facts show that the lands of appellent are separated from direct connection with the proposed road by lakes and brakes which are impassable. The evidence shows that it would not be practical to construct bridges over this impassable way and the only practical route for appellant to use the improved road is to leave her land and go upon adjoining lands in order to reach the road." (R. p. 35).

ASSIGNMENT OF ERROR

Now comes Mrs. M. L. House, Petitioner herein and Plaintiff in Error, by her attorneys, Joseph M. Hill, and Henry L. Fitzhugh, and in connection with her petition for writ of error makes and declares the following assignment of errors, to-wit:

First. The Court erred in deciding that the notice authorized by Act 245 of the General Assembly of 1919, which notice provided for a publication once a week for two weeks of the hearing upon the assessments of benefits levied against real property in the District, and which notice in this case was published in a weekly newspaper in Conway County, Arkansas, in its issue of July 23rd, and 30th, 1919, advising all persons to file their objections to their assessments in writing before August 12, 1919, and stating upon which date the Commissioners would hear and determine such objections so filed in writing before said date, was due process of law as guaranteed in the Fourteenth Amendment to the Constitution of the United States.

Second. The Court erred in deciding that the notice in the

form prescribed by Section 20 of Act 245 of 1919 which is as follows:

"Notice of the Assessment of Benefits in Road Improvement District No..... of Conway County, Arkansas.

Notice is hereby given that the assessment of benefits and damages in Road Improvement District Number.....of Conway County has been completed and is on file with the Secretary of said Commissioners, and is open for inspection, and a copy of said assessment of benefits and damages is on file in my office and open to inspection and that the said Commissioners for said District will on the.....day of....., ..., attend at....., Conway County, for the purpose of hearing any complaints against any of said assessments of benefits or damages.

Any complaint of any of said assessment of benefits must be filed with the Secretary of said Commissioners in writing before the date of said hearing."

And which notice was given in the above form in this case, said form being filled in by inserting the number of the District, the name of the clerk and the date and place of the hearing, constituted such notice as complied with the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Third. The Court erred in deciding that the system of levying special assessments as pursued by the Commissioners of the defendant District acting under said Act 245 of 1919, when applied to the assessment of the appellant's property was valid, instead of holding the same to be arbitrary under the facts herein and in not holding the same to be arbritary under the facts herein and in not deciding that the said action of the Commissioners in applying the system which they did apply under authority of said Act 245 amounted to taking the plaintiff's property without due process and deprived her of equality before the law.

Fourth. The Court erred in deciding that said Act 245 of 1919, creating the defendant District was not an arbitrary act of the Legislature in that it excluded benefited lands and included lands not benefited, thereby taking appellant's property to pay for public improvements without compensation and depriving her of her property without due process of law.

Fifth. The Court erred in deciding that Act 245 of 1919, creating the defendant District was not an arbritary act of the Legislature in that it excluded benefited lands and includ-

ed lands, if benefited at all, less than excluded lands similarly situated to appellant's land, and if the appellant's lands were benefited, necessarily the excluded lands similarly situated were benefited, thereby denying the appellant equal protection of the law and taking her property without due process.

Sixth. The Court erred in deciding that notwithstanding the evidence established that part of appellant's lands were inaccessible to the improved road without going outside of the District and through lands nearer the improved roads than her land, which lands were not included in the District, because it held that the Court could not decide that the action of the Legislature in creating the District including her lands was arbitrary, and that such action deprived plaintiff of her property without due process, and denied her equal protection of the law, as it held that it could only so decide when the facts so appeared from the face of the Act itself, or from facts of which the Court took judicial notice.

By reason whereof, this petitioner and plaintiff in error prays the decision of the Supreme Court of Arkansas may be reversed and justice done. (R. p. 38).

THE ASSESSMENTS ARE VOID, BECAUSE NO BENEFITS RECEIVED

Although fully presented in the complaint, to which a demurrer was sustained, and stressed in printed brief and oral argument, the Supreme Court did not discuss the allegation that there was no benefit whatever to Mrs. House' lands by reason of the construction of the improvement. The reason that there was no benefits was set forth in detail in the complaint and its amendments, showing that the improved road ran away from her property and served no useful purpose in the present or in the future of it, or its occupants.

In this respect this case differs from the No. 2 case wherein it is alleged that the benefits are excessive and discriminatory, but is is not alleged that there was no benefit to her land by the construction of the No. 2 road.

The Supreme Court of Arkansas in a carefully written opinion by the present Chief Justice, then Mr. Justice McCulloch, in St. Louis S. W. Ry. Co. vs. Board of Directors of Red River Levee District No. 1, 81 Ark., 562, drew the distinction between a Legislative determination of benefits where there was some benefit, but not to the extent assessed,

and where there was no benefit, holding that the former was impervious to attack, while the latter under the principle in Norwood vs. Baker, 172 U. S. 269, not modified by later decisions therein referred to, could be relieved against in equity. In that particular case the Court went into consideration of the facts and found that according to the weight of the testimony there was some benefit to the property by reason of the improvement, and therefore the doctrine of Norwood vs. Baker did not apply.

Shortly after this decision another case was presented to the Court, wherein the allegation showed no benefit whatever; Coffman vs. St. Francis Drainage Dist., 83 Ark., 54. In fact the allegations of the bill there were quite general, not near as detailed as in the case at bar, but they were sufficiently definite for the Court to hold that if the allegations were proved true, that the plaintiff would be entitled to relief in equity.

This case has never been overruled, in fact has been much cited and quoted from in later decisions, even in these road district cases. In Bush vs. Delta, Road Improvement District, 141 Ark., 247, it is approved and classed with Myles Salt Co., vs. Board of Commissioners, 239 U. S. 478, as a class of cases wherein the Courts grant relief where the assessments are without benefit to the land, because such would be taking property without due process and denying equal protection of the law.

Again in Burr vs. Beaver Dam Drainage Dist., 145 U. S. 51, it is again approved as stating a principle wherein the Courts will grant relief, because otherwise it would be confiscation of property without benefit.

In the opinion in the No. 2 case the Court invoked against the plaintiff's charge of excessive and discriminatory assessments the limitation in the Act within which the land owner might complain (R. p. 34).

Therein the Court cites the recent cases to the effect that the method provided in the statute for attacking the validity of assessments of benefits is exclusive and that it must be pursued within the time prescribed by the statute (R. p. 35).

We presume that the Court intended this to be the answer to the attack in this case that there were no benefits whatever from the improvement of the road in the No. 5 District to the plaintiff's land, although the opinion in this case is silent on that proposition.

We have then before the Court this situation: Constructive notice is given for 18 days for a hearing before the Board of Commissioners and the property owner may file before the Commissioners complaint of his assessment and it is made the duty of the Commissioners to hear the complaint and to consider the assessment and if they find any assessment of benefits is inequitable or unjust, they shall correct the same.

Does such a notice and such proceeding preclude the landowner from an attack in equity of an assessment of benefits where there is no benefits whatsoever to his land? This notice and this proceeding before the Commissioners clearly does not contemplate a hearing on the basic fact of no benefit whatever, which is a hearing on the question of confiscation; but contemplates a hearing to correct inequality and injustice in the assessment of the landowner as compared with other assessments. The statute provides that any landowner who has complained in writing of his assessment before the Board and feels aggrieved by the action of the Board may file a complaint in equity within ten days. Section 21 of the Act (p. 22 of the No. 2 record).

The Court in construing this Section eliminated the provision that the landowner must have complained in writing before the Commissioners before he would have a right to file this suit. (p. 31 of No. 2 record).

Therefore under the decision as rendered construing this Act any landowner in this District had ten days from the date of hearing before the Commisisoners to bring a suit in Chancery to attack the assessment. This is the only remedy provided in the Act wherein the landowner could obtain relief in court from an assessment which amounted to confiscation of his property in that there was no benefit to his property from the improvement.

Therefore under the decision, construing the right of landowners to raise this question in the court, it is limited to the ten days given in Section 21 of the Act. Is that due process?

The notice prescribed in the Act and the notice which was actually given does not inform the landowner that he has a right to file a suit within ten days after the hearing before the commissioners: but on the contrary the notice on its face would indicate that the sole remedy of the landowner is for a hearing before those Commissioners, and certainly the landowner had a right to take the notice on its face to mean exactly what it said, and no more.

The Supreme Court of Arkansas has held that where the integrity of the District is attacked that such suit does not come within the provisions limiting the time for reviewing assessments of benefits.

Phillips v. Tyronza & St.Francis Road Im.Dist.,145 Ark.457.

According to the face of the notice and the term of the Act, if Mrs. House had received this notice on the day after the hearing, not having filed her complaint in writing the day before the hearing, under the terms of it she would have no right to bring the suit in equity, and certainly the later construction of the Act opening that right to her under those circumstances cannot change the effect of the notice itself. We submit that the Myles Salt Co., case hereinafter reviewed sustains the right to maintain this suit irrespective of the ten day limitation in the Act.

THE LEGISLATIVE ACT ARBITRARY IN THE FORMATION OF THE DISTRICT AND IN INCLUDING PLAINTIFF'S LANDS

This proposition resolves itself into two distinct subjects which were discussed by the majority and minority opinions of the Court, and upon each of which the Supreme Court of Arkansas is divided three to two, as to whether the legislative action in each respect amounted to an arbitrary exercise of power which denied the plaintiff the equal protection of the law and took her property without due process.

First: In Ruddell vs. Rutherford, 145 Ark. 49, the facts were that the Legislature eliminated from a road district a section of land and left within the road district lands from which to reach the improved roads in the District, travel would have to be over the excluded lands.

This was because of the topography of the country, it not being practicable to go from the included lands to the roads without traversing the excluded lands.

The Court held that it was apparent that this excluded land would be benefited by the improvement if the included land would be benefited, and by eliminating this Section 18, the excluded land, the Act of the Legislature was arbitrary and discriminatory on its face, and therefore void. There were earlier decisions of the Supreme Court applying the same principles which are cited therein. Exactly the same situation was present here. An examination of the map of the District (p 2½ of the record) will make this clear.

The crosses in Section 21 show Mrs. House' land nearest the improved road. The undisputed evidence, and which was accepted as proof by the majority of the court, shows that between Section 21 and the town of Plummerville, where the

road begins, there are creeks, cypress brakes and sloughs, which render it impossible to reach Plummerville and the improved road without going out of the District and traversing Sections 29 and 30, which were excluded from the District and which are nearer to the road than Section 21, and necessarily if there was any benefit to Section 21, there is more benefit to Sections 29 and 30, which were excluded. The same is likewise true of her land further east.

Instead of applying the principle of Ruddell vs. Rutherford to the instant case the Court drew this distinction; that the Courts only declare a Legislative action arbitrary where the invalidating facts appear upon its face or from matters of which the Court may take judicial notice.

The Court stated that the impasse in the Ruddell case was an island and a navigable stream, of which the Court took judicial notice (R. p. 31). However it will be seen from an examination of the case of Ruddell vs. Rutherford that no such point was made in the opinion.

The opinion of the Court here admits that if it could take judicial cognizance of what the undisputed evidence established, or if what is indisputably established appeared on the face of the Act, that it would declare these assessments void as not affording Mrs. House equal protection of the law and taking her property without due process; but because the invalidating facts are developed in evidence which the Court accepts as true, yet such relief cannot be granted.

This limitation upon the right of the Courts to protect property from confiscation has so far as we are able to discover never before been invoked either by the Supreme Court of Arkansas, or this court. In fact, no court has gone further heretofore than the Supreme Court of Arkansas in sustaining the constitutional right and duty of the Courts to avoid a statute of a State which deprives a person of his rights under the Federal Constitution.

No sounder statement of the principle can be found in any court than in the opinion of the present Chief Justice, than Justice McCulloch, in the case of Louisiana & Arkansas Ry. Co., vs. State, 85 Ark., 12. In that case the Legislature passed an Act requiring the Railway Company to establish and maintain a depot at Snow Crossing in Columbia County, Arkansas. The Company refused to construct it and was indicted under the terms of the statute. The Railway Company filed a plea that there was no public necessity calling for the establish-

ment of such a station and that because of the topography of the country it would be impracticable except with very great expense to provide side tracks and passing tracks at said point, and offered testimony to prove its allegation, but the Court refused to hear the evidence and fined the Railway Company and it appealed. The Supreme Court, after quoting from Norwood vs. Baker that "There is a point beyond which the Legislative Department, even when exerting the power of taxation may not go inconsistently with citizens' right of property." Said, "That principle is applicable here. When the Legislature passes a special act requiring the doing of a certain thing, such as the establishment and maintenance of a station at a given place by a railroad corporation, there may be a judicial question presented whether or not a real necessity exists for the doing of the thing in order to reasonably serve the public convenience. It is a question primarily for Legislative determination, and that determination should not be disturbed by the Court unless the power has been exercised arbitrarily and without reason. In other words, the Legislative determination should be and is conclusive unless it is arbitrary and without any foundation in reason and justice.

There may be cases where the power is exercised so arbitrarily and unreasonably that the Court should declare, as a matter of law, that the Legislature exceeded its power, and that the Legislative determination should be disregarded.

This principle is, we think, clearly recognized by the decisions of the Supreme Court of the United States in the cases involving the validity of Legislation directly fixing rates for transportation of passengers and freight. Dow vs. Beidelman, 125 U. S. 680; St. Louis & S. F. Rd. Co. vs. Gill, 156 U. S. 649; Chicago & G. T. Ry. Co. vs. Wellman, 143 U. S. 339; Smyth vs. Ames, 169 U. S. 467, Covington & L. Turnpike Co. vs. Sandford, 164 U. S. 578.

The application of the principle is necessarily somewhat different in the case of a general rate-making statute from a statute imposing duties like that imposed in this case, but the principle is the same.

This brings us to a consideration of the question whether or not the appellant in this case offered to bring to the attention of the Court facts sufficient to show that there is no public necessity for a station at Snow Crossing, and that the requirements of the Legislation in that respect are so arbitrary and unreasonable as to demand a judicial review so as to relieve the railroad company from compliance therewith.

The rejected evidence tended in substance to show that there was no public necessity at all for the maintenance of a station at Snow Crossing; that the land around that place which is not a point of intersection of two railroads, but is only the crossing of a country road over the railroad, is principally wild, uncultivated and sparsely settled; that there is such a heavy natural grade at that point on the road as would not only render it very expensive to build side tracks, but would add greatly to the danger of accidents in stopping trains; that there is now a flag station on appellant's line two and a half miles north of Snow Crossing, and also a regular station four and a half miles south of Snow Crossing, where there is a depot building and where a telegraph operator and passenger and freight agent is kept; that these two stations provide suitable, convenient and ample transportation facilities to the people near Snow Crossing; and that the cost of erecting and maintaining a station at that place would be greatly in excess and out of proportion to the revenues which could possibly accrue from the business at that place, and that the station would have to be operated at a monthly loss to the company.

Now this evidence tended to show that there is no public necessity for a station at the place named, and the Court should have heard and considered it for the purpose of determining whether or not the statute was a valid exercise of power by the Legislature."

And further the Court stated:

"The utmost force must be given to the Legislative determination of the necessity for a station and the reasonableness of requiring the company to erect and maintain one; but appellant presented a question for judicial review, and for the Court to refuse a consideration would be to deny it the equal protection of the law, and would, in effect, be depriving it of its property without due process of law."

Then the Court passed to the exact question determined here, whether this was a question of law, or one of fact, and decided it was a question of law to be determined from the facts adduced before the Court, and further held that the Court was not bound by the facts presented, but it should possess itself of all the information obtainable before it undertakes to set aside an enactment of the Legislature and on this subject cites Chicago etc. Ry. Co. vs. Wellman, 143 U. S. 339.

In reinforcing the reasoning of the conclusion reached, the

Court used as an illustration the power of the Legislature over the subject of special taxation for local improvements which it stated was unquestioned, but reannounced the doctrine of Coffman vs. St. Francis Drainage Dist., 83 Ark., 54, which holds that that power when exercised arbitrarly and unreasonably is not beyond judicial control; and as in the Coffman case, the Court returned the case to the trial Court for the evidence to be developed on the allegations which charged, in effect, confiscation.

Hence it was unquestionably the law of Arkansas that in deciding rights under the Federal Constitution, until this case was decided, that the Court heard evidence and from that evidence announced the law as to whether the Act was arbitrary or valid, and did not consider itself precluded from going into evidence, and as now confining the determination to the face of the Act and matters of which it took judicial congnizance.

In other cases presenting this exact question of whether an Act of the Legislature was arbitrary in including land and excluding land the Court heard and determined issues on the evidence presented in Sadler vs. McMurtrey, 152 Ark., 621; Neterer vs. Dickinson, 153 Ark., 5.

Hence when the Court has in this instance departed from its settled principle of declaring void Legislation when invalidating facts show that the Legislation impairs rights under the Constitution of the United States, we have a right to appeal to the clear statements heretofore announced by the Supreme Court of Arkansas on the duty of the courts in these matters, as conclusive on this subject. But this Court has so thoroughly settled this question it is unnecessary to show that the Supreme Court of Arkansas was, until this decision, of the same mind.

In Rowland vs. Boyle, 244 U. S. 106, a stockholder of a railroad company filed a bill in equity and attacked a statute of Arkansas, fixing a two cent passenger rate and orders of the Arkansas Commission fixing freight rates.

The Railroad Company presented a complicated and intricate system of accounting which if accepted as correct, showed that the rates prescribed by the Legislative act and by orders of the Commission, were confiscatory.

The writer of this brief urged upon the Court that the evidence was not sufficiently clear to justify it pronouncing invalid an act of the Legislature and orders of the Commission

within the rule announced in Allen vs. Railroad, 230 U. S. 553, but the Court thought otherwise, and while pointing out these were errors in the system of accounting, yet taken as a whole the Court was of opinion that the railroad had shown successfully the rates to be confiscatory.

These invalidating facts were entirely shown by parol evidence, much of it opinion evidence. Had this new rule of the Arkansas court prevailed here, the statute, being fair upon its face and the facts presented not being those of which the Court took judicial notice, it, at least, would have been saved from annulment.

There is no difference in principle and very little in fact between this case and Myles Salt Company vs. Iberia & St. Mary Drainage District, 239 U. S. 478. In that case the police jury of Louisiana proceeding strictly according to the local statutes, created a drainage district and included therein Weeks Island, which was valuable for salt deposits; it rose to a height of 175 feet above sea level, whereas the surrounding country was only 15 feet above sea level. There was no need of drainage of Weeks Island, in fact the problem there was to guard against washing and erosion. All of the statutory requirements were strictly complied with, but when the drainage district sought to collect the taxes the owners of this land sought to enjoin their collection, on the ground that the drainage system was no benefit to the plaintiff's lands and was formed only for the benefit of the other lands and was an usurpation of authority, and was an effort to take plaintiff's property without due process of law.

The Supreme Court of Louisiana held that the creation and determination of drainage districts being a legitimate and lawful exercise of discretionary powers, the Courts were without power to impugn or inquire into motives where no fraud was pleaded.

The Louisiana court went to the extent of holding that local authorities had an absolute right to organize drainage districts and give them shape and boundary lines as they choose, unless there was some element of fraud in their creation and the Court would not entertain an attack upon the lines of the District and the assessments levied therein in the absence of fraud.

That case, as this one, was disposed of on a demurrer to the complaint which invoked the protection of the Federal Constitution. This Court decided it could not concur in the views

expressed by the Louisiana court and stated that it was true that the law of the State as written was not attacked, but the law as administered and justified by the Supreme Court of the State was attacked.

In unanswerable reasoning this court decided where an improvement district is so formed to include property which cannot be directly benefited, including it only that it may pay for the benefit to other property, is an abuse of power and act of confiscation.

While arising in a different way, yet it is quite pertinent to this discussion, to call attention to K. C. S. Ry. Co., vs. Road Improvement District No. 6 of Little River Co., Arkansas, 256 U. S. 658. This was another case of arbitrary exercise of power in the levying of assessments clearly for the benefit of other land. It may be interesting to note in connection with this case that the arbitrary assessment therein was sustained by a three to two decision of the Supreme Court of Arkansas, 139 Ark., 424, and that Justices Wood and Hart, who dissented in this case, dissented in that case, and their ground of dissent is exactly the reason which are elaborated by Mr. Justice McReynolds in delivering the unanimous opinion of this Court sustaining the view which they expressed in the Supreme Court of Arkansas.

The majority of the court, as stated refused to declare this act as administered by the Board to be unconstitutional, on the ground that the invalidating facts did not appear on the face of the Act, or from matters of which the Court may take notice and stated that the Federal cases relied upon, Houck vs. Little River Drainage District, 239 U. S. 255, and Myles Salt Co., vs. Iberia, etc. 239 U. S. 478, recognized that distinction. (R. p. 32). For that reason we have gone more tediously into an analysis of the facts in the Myles Salt Co. case than otherwise we would have done, as an examination of it shows conclusively that the majority opinion was in error in stating that this court refused to invalidate legislative action unless the invalidating facts appear on the face of the act, or from matters of which they took notice; all the facts were developed by parol testimony.

The Houck case did not reach to this point at all, but merely decided a question of preliminary expense in local improvement districts. We conclude the discussion on this subject by quoting from the opinion of Justices Wood and Hart as follows: "With reference to the facts showing the arbitrary action of the Legislature but little need be said. The un-

disputed facts show that the lands of the appellant are separated from direct connection with the proposed road by lakes and brakes which are impassable. The evidence shows that it would not be practical to construct bridges over this impassable way and the only practical route for appellant to use the improved road is to leave her land and go upon adjoining lands in order to reach the road.

This brings the case directly within the rule announced in Ruddell vs. Rutherford, 145 Ark., 48, and other cases of like character.

We concede the general rule to be that if the Legislature has fixed the boundaries of the District and laid the special tax or provided for a subordinate agency to do so, its action must in general be deemed conclusive. To invoke the intervention of a court against the result of its conclusion is to invoke judicial authority to give its judgment controlling effect over that of the Legislature in a matter of the apportionment of a special tax, and this can only be done where the Legislative action is manifestly colorable and arbitrary. This is the basis of our holding in Ruddell vs. Rutherford, supra.

In that case the Legislature eliminated Sec. 18, and thereby determined that it was not benefited by the improvement. It included Sec. 19 in the District, thereby concluding that it was benefited. It appeared from a map introduced in evidence that it was impractical to go from Sec. 19 to that part of the District where the improved road was without passing through Sec. 18. Hence the statute was held to be arbitrary and discriminatory on its face.

The Court was not concerned about the method of proof. Because the Act on its face was discriminatory was not the fact which gave the court jurisdiction. The arbitrary and discriminatory action of the Legislature was what made the exception to the general rule and gave the court jurisdiction in the premises. This is illustrated by the case of Little Rock vs. Katzenstein, 52 Ark., 107.

In that case the Court held that the action of the city council in including property in an improvement district is conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake.

The Court said that a demonstrable mistake of fact, meaning by this expression, a mistake of fact as to the existence of which there was no room for doubt. If no such limits exist, the power of local assessments would be but another

means for arbitrary exaction and in such cases the wrong must always be open to correction."

Second. The next contention considered by the Court on this subject was that the act on its face designating the lines of the district made an arbitrary selection of included and excluded lands and was therefore void as depriving plaintiff of the equal protection of the laws and taking her property without due process.

An examination of the map of the District itself, shown at page 2½ of the Record, and the evidence shown at page 2 demonstrates the soundness of this position.

The physical conditions southeast of Plummerville were the same as at equidistant southwest, and the physical conditions on either side of the improved road were similar. This map shows that the District was from one-half mile to one and a half miles wide on the west side at Plummerville, and for some distance north of it, and extends seven miles on the east side, the District only extends at Plumlerville, the southern terminus of the road, one and a half miles west and directly east—seven miles.

Sections 25, 29 and 30 south of Plummerville are all nearer the road than any of Mrs. House' lands situated in Sections 21, 22 and 23, and lands in those Sections were accessible to the roads, whereas her lands are not accessible, and to reach the road from her lands it is necessary to pass out of the District and back into it. Traveling north, the District runs to an attenuated narrow District a half mile long at one place and varying lengths at others.

Take the situation at the town of Plummerville, only one and a half miles west of it is included subject to taxation, whereas seven miles east of exactly the same character of country and physical situation is taxed. Quite a similar situation was presented to this court in Gast Realty & Inv. Co. vs. Schneider, 240 U. S. 55, and was thus disposed of by this court.

"The ordinance, following the charter as construed established a line determining the proportions in which the tax was to be borne that, after running not a hundred feet from the street, leaped to near 500 feet when it encountered such a tract, and on the opposite side of the street was 150 and 240 feet away. The differences were not based upon any consideration of difference in the benefits conferred, but were established mechanically in obedience to the criteria that the charter directed to be applied.

The defendants' case is not an incidental result of a rule that, as a whole and on the average, may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing a local tax in grossly unequal proportions, not because of special considerations, applicable to the parcels taxed, but in blind obedience to a rule that requires the result."

In Thornton vs. Road Improvement District No. 1 of Clark County, Arkansas, 291 Fed. 518, the Circuit Court of Appeals of the Eighth Circuit had before it the assessments made in a road district created by special Act of the Legislature of 1919. The case was decided by Judges Sanborn and Kenyon, Circuit Judges, and Symes, District Judge, Judge Sanborn writing the opinion of the Court.

The facts showed that there was a road district created in Clark County under a Public Act No. 338 of 1915, generally known as the Alexander Road Law, but that a lateral road into this District was created under Special Act No. 374 of 1919, and it was the assessments levied under the Special Act which were under consideration by the court.

The property owners in that case were non-residents and had no actual knowledge of the levying of these assessments until long thereafter. The assessment in this case was also attempted to be cured by special act of the Legislature. One of the matters considered was the arbitrary assessment of property against the landowners, while property of other landowners abutting to and in the vicinity of part of the land in controversy was assessed nothing and subject to no taxes for the construction of the road.

The case of Gast Realty & Investment Co. vs. Schneider, Granite Co., 240 U. S. 55, was cited and the principle announced therein quoted from in support of the principle that where a special assessment is applied in such way as to result in disproportionate taxation of lands fronting on the improvement, that it is void, as conflicting with due process of law; after stating that principle, the court decided it would not sustain an assessment of benefits, based under a law which required and resulted in the assessment of benefits to and taxation of lands within five miles of each side of the east eleven miles of a road 26 miles long for the entire cost of the road, and the exemption of lands on either side of the west 15 miles of that road from any assessment of benefits

whatever and from the payment of any taxes on account of that improvement.

The facts here are worse than the facts there; here property within a mile of the improved road was exempted from taxation, while property from two to seven miles away from it is taxed; and to get the benefit of the road by the land thus taxed it is necessary in order to reach the road to go without the limits of the road and pass through this untaxed land—surely a worse case than either the Gast Realty Company case or the Thornton case.

Again we quote from the dissenting opinion of Judge Wood and Hart:

"But here again there is a well known exception to the general rule and that is that the Legislature cannot act in an arbitrary, discriminatory manner in fixing the boundaries of a district.

In concluding this discussion on this branch of the case the majority opinion gravely adds that this court is firmly committed to the doctrine that improved roads must necessarily have termini, and the improvement districts, boundaries. This is so in the very nature of things, but it does not follow that the legislature can not act arbitrarily in fixing the boundary without its action being reviewed by the courts. There, as here, the testimony is all one way and shows that the Legislature acted arbitrarily and in discriminatory manner in fixing the boundaries of the District. The court should declare as a matter of law that the creation of the District was invalid, and any assessments levied under it an illegal exaction. To hold otheriwse is to deprive the landowner of his property without redress."

Respectfully submitted,

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No. 384

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 384, OCTOBER TERM, 1923

MRS. M. L. HOUSE, PLAINTIFF IN ERROR,

vs.

ROAD IMPROVEMENT DISTRICT NO. 5
OF CONWAY COUNTY, ET AL.,
DEFENDANTS IN ERROR

REPLY BRIEF OF PLAINTIFF IN ERROR

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THE LEGISLATIVE ACT ARBITRARY

This contention embraces two distinct propositions:

(a) The one first discussed in the brief of defendant in error, which is the one last discussed in our former brief, and is this: The lines of the District are shown on the map, page 2½, and the evidence proved that the physical conditions on either side of the improved road are similar, and the physical conditions southeast of Plummerville were the same as at an equi-distance southwest thereof (R. p. 2.)

Turning to the map it is seen that at Plummerville, the southern terminus of the road, the District extends 1½ miles west and 7½ miles east. At a point two miles north of Plummerville the District only extends a half mile west and 7 miles east of the road. Turning to the southwest, which is physically the same as the southeast, it is found that section 24 only is included, corresponding to section 20 on the southeast; while sections 21, 22, 23 and 24, containing plaintiff's lands, are included on the southeast, and no corresponding sections to them on the southwest. The contention being that

such a district obviously excluding large areas of benefited land and capriciously including as benefited tracts manifestly less benefited than the excluded tracts, is void.

Counsel liken the form of the District to the letter "E" (Brief p. 2) and argue that because there are laterals running east, and none west, that the District naturally extends further east than west; but the facts do not back the argument.

Evidently reference is made to the lateral running East two miles north of Plummerville (whether the prongs on the north end of the road are laterals, or main lines, makes no difference as they are too remote from this property to have any effect.)

It will be noted that the nearest point of plaintiff's land to that lateral is more than 2½ miles, and the greater part of her land considerably further than that from the lateral; whereas the land on the west running from a half mile to a mile and a half of the main road from Plummerville north is excluded. In other words, the benefit from the lateral extended to wider territory than the benefit from the main road. Moreover, between this lateral and the plaintiff's land lie the railroad, and the improved road in District No. 2, which carries all traffic into Plummerville and from Plummerville north to the lateral, in order to reach it (R. pp. 11 and 15.) Hence the lateral cannot be a diffusing point of benefit.

The Act is sought to be sustained through section 7 of it, which is set out in defendant's brief (pp. 2, 3.)

The Supreme Court sustained the Act against this charge by reason of said section, and said that the remedy for property owners was not to impeach the validity of the District on account of the exclusion of benefited land, but to move the inclusion of them (R. p. 30.)

Had the Act been attacked in advance of the assesments being levied on account of benefited lands being arbitrarily excluded, then the court might well have answered that the property owners had not shown injury, because it would be presumed that the Commissioners would, under section 17, include benefited lands, so as to reduce the plaintiff's assessments by their inclusion as the Act authorized them to do. But a far different situation is presented where the Commissioners have not done so, but have levied assessments for

20 years on the plaintiff's land and did not include large areas of benefited land much nearer to the road than her land.

There are two things apparent from the terms of the Act:

FIRST: The benefited land not included in the boundaries must be added before the assessments are levied. Section 16 provides for filing plans of the improvement with the county clerk; section 18 provides for notice of hearing on these plans; section 19 provides for the court to consider the plans, change or modify them. Then follows section 20 providing that after the approval of plans the Commissioners shall proceed to make the benefit assessments. Thus it is seen that section 17 is injected in these provisions and it stands alone.

Section 20 following these provisions, and from its context also, shows that the assessments are only to be made after the plans and boundaries are fixed. Clearly there is no authority in the Act to make assessments for 20 years and then turn around and upset them by re-creating the District, certainly not after bonds are issued.

Section 28 provides that these assessments shall be a first lien, prior to mortgages and all other liens, and section 34 provides that the bond-holders may have a receiver appointed to collect the assessments when they are not paid.

Thus the property owner is put in this position:

He has a first mortgage on his property for 20 years and the right of the holder of the mortgage to have a receiver appointed, if he does not pay his assessment, and yet it is said that he should move to have the benefited land not in the District brought into the District, instead of attacking his assessment, which is based upon an arbitrary drawing of lines excluding benefited lands.

In Myles Salt Co., v. Board of Commissioners, 239 U. S., 478, the court said: "It is true the law of the State as written is not attacked, but the law as administered and justified by the supreme court of the State is attacked."

SECOND: It is also clear that under section 17 no one is authorized to move for the including of excluded lands except the Commissioners. It makes such proceedings depend upon the Commissioners finding lands beyond the boundaries of the District will be benefited by making the improvement,

and the Commissioners shall, when they so find, make a report of the same to the county court, and then the proceedings is begun with notice to affected property owners.

There is no statutory authority for anyone, other than the Commissioners, taking this action and their finding of fact is the predicate of it.

Therefore, when they do not act under this section, but levy an assessment for 20 years based on the lines of the District as drawn by the Legislature, they confirm the arbitrary action of the Legislature. It will not do to say that because they are given power to cure that arbitrary action of the Legislature that the Act can be saved by this power being given when the Commissioners do not exercise it; or rather failed to exercise it at the only time when they could validly do it, that is, prior to the levying of the assessments.

This is an attack on the assessments as levied under the Act; and it is proved that the lines of the District as drawn by the Legislature are arbitrary and exclude benefited lands, to the detriment of the plaintiff, and that these assessments stand for 20 years; hence section 17 "makes the promise to the ear and breaks it to the hope."

(b) The other contention that the Act is arbitrary rests on the proved and accepted fact that plaintiff's lands in sections 21 and 22 are separated from the improved road in the District, so that it is necessary to go out of the District over land nearer to the improved road than said sections to reach the road: in other words, excluded lands between these sections and the road are necessarily benefited, and are excluded, while the plaintiff's land in said sections, if benefited at all, are necessarily less benefited than the excluded lands through which it is necessary to go from her lands to reach the improved road.

It is said that because there is a small creek and a marsh separating some of plaintiff's land from the highway and making access to it difficult, that the plaintiff contended that the Act creating the District is a nullity (Brief p. 6.)

The facts do not sustain the statement. The record shows that the plaintiff's testimony was to the effect that her lands in section 21 and 22 were separated from the improved road by Gap Creek, and cypress brakes and swamp,

and that the only practical route of travel from said sections was to pass without the District and go south into section 28 and there strike the road to Plummerville, going through sections 29 and 30, and said sections 28, 29 and 30 are out of the District.

Then a similar statement is made relating to the road from the east end of her property (R. p. 2.) There was evidence that there is no feasible or practical route, owing to the topography of the land and the physical condition of the brakes and swamps, to reach the road to Plummerville from sections 21 and 22, without excessive expense in bridging and constructing an embankment, other than through the routes described.

While there was some testimony by the District tending to controvert this testimony, yet it was disregarded by the court (R. pp. 2, 3.) The majority opinion states:

"Appellant alleged and made proof that on account of Gap Creek and cypress brakes, the only practical route from said lands in section 21 to the improved roads in said District is to cross the south boundary line thereof and pass over lands not included in the district, and a part of which was nearer the improved road than appellant's lands." (R. p. 3.)

The majority as well as the minority of the court having accepted this testimony, it is an established fact in this court that the only practical route from plaintiff's land to the improved road is to cross the south boundary of the District and pass over lands not included in the District, part of which is nearer the improved road than appellant's land, and this is held not to be an arbitrary act of the Legislature and void as such, because the evidence thereof is not that class of evidence of which the court takes judicial cognizance. (R. pp. 31, 32.)

The court had in Ruddell v. Rutherford, 145 Ark., 49, held that a similar condition rendered an Act void as an arbitrary exercise of the legislative power; and this opinion approves that decision, but draws a distinction between it and this case in that the impasse in that case was an island and a navigable stream, of which the court took judicial notice, whereas the impasse in this case was proved by parol testimony, which the court accepted as true. Therefore, the real

question on this issue is whether an arbitrary exercise of the legislative power has to be shown on the face of the Act itself, or in evidence of which the court takes judicial cognizance before relief to the taxpayer can be given.

In Myles Salt Co., v. Board of Commissioners, etc., 239 Ark., 478, the invalidating facts there appeared in the allegations of the complaint which from their nature must have been proved by parol testimony explaining the physical condition of Weeks' Island and the surrounding country; just as the physical condition was alleged and proved here.

The approval of the position of the Supreme Court of Arkansas on this question necessarily calls for this Court over-ruling its decision in the Myles Salt Company case.

In our brief beginning at page 14 we cited numerous cases from the Supreme Court of Arkansas where that court had prior to the decision in this case, declared unconstitutional acts of the Legislature where the invalidating facts were clearly and satisfactorily proved to the court, regardless of the class of evidence which convinced the court. In none of them did the court limit itself to the face of the Act or matters of which it took judicial cognizance. But now a new doctrine is announced, and as we view it, this new doctrine is contrary to the decisions of this Court and the previous decisions of the Supreme Court of Arkanasas, which we have heretofore cited at pages 14-18 of our brief.

NO BENEFITS RECEIVED

This case differs from the No. 2 case in that there is no allegation in that case that there is no benefit to the plaintiff's land by virtue of the improvement of the road. The allegation there is that the assessment is excessive, discriminatory and confiscatory, and in this case the same allegations are made as to the assessments being excessive and discriminatory, and the additional allegation is made that the improvement of the roads in the No. 5 District would be no benefit whatever to the plaintiff's land. This is not made as a generality, but the facts inducing this conclusion are stated in full.

The complaint (R. p. 11) sets out in detail the improvement contemplated and the relation of the plaintiff's land to

the roads being improved, and alleges that from the town of Plummerville, which is the southern terminus of the road, the road runs north into a hill country with which there is no trade or other relation with the cotton country south of the railroad and south of the improved road in the No. 2 District, either in the present or future uses of the plaintiff's lands, and the road diverts travel away from plaintiff's lands and only improves the country it traverses and serves.

In an amendment to the complaint (R. p. 14) further facts regarding the situation are alleged. The plaintiff took evidence sustaining her allegations, but it was excluded and a demurrer to all of the allegations in the complaint and amendments alleging that there were no benefits to the land, sustained.

Counsel seek to sustain this action on the same ground which they seek to sustain the action in the No. 2 case, that is, that 18 days constructive notice of the hearing constituted due process, and that the 10 days provided in the statute for bringing suit after that hearing was a valid limitation which prevents any other suit being brought, notwithstanding there was no benefits and notwithstanding the assessments are confiscatory.

Counsel rely upon the same cases here which they do in the No. 2 case, to-wit: Milheim v. Moffat Tunnel, Imp. Dist., 262 U. S., 710; Farncomb v. Denver, 252 U. S., 7, and Campbell v. City of Olney, 262 U. S., 352.

We have in our reply brief in the No. 2 case at pp. 9, 10 and 17 discussed these cases, and it is thought demonstrated that none of them support the contention made by counsel, as none of them went to this issue.

This is the concrete situation resting upon this theory of the defendant: In the No. 2 case there is an assessment including interest, of $30,323.00 levied on the plaintiff's entire farm, and in the No. 5 case an assessment of $18,936.00 levied on 960 acres of it (R. p. 4), total assessments of $49,259.00.

The admitted facts are that the $30,000.00 assessment is discriminatory and confiscatory and that the $18,000.00 assessment is for the improvement of a road which confers no benefit whatsoever to the 960 acres against which it is levied.

It is sought to sustain these impositions on a constructive notice published for two weeks, calling for a hearing 18 days from the date the notice is signed; during which time the plaintiff was in Washington City—fully 1000 miles away from the property, and without information whatever of the creation of the District, the proceedings against her lands, and the levying of the assessments until some five or six months after they were levied. And it is broadly contended because the creating Act, which was a Special Act, unpublished and unknown generally to the community, passed without previous notice having been given of the intention to introduce it, as required by the Constitution, provided that all actions to attack the assessments must be brought within 10 days after the hearing (notice of the hearing only was given—not of the right of action) and that the 10 days' limitation having expired, no other action can be brought to afford relief against admittedly confiscatory assessments.

We have in our first brief set out at pp. 10 and 11 the authorities that we rely upon to sustain an independent action for relief under such circumstances and will not burden this brief with repeating them.

But we desire to especially call attention to one paragraph in Myles Salt Co., v. Board of Commissioners, 239 U. S., 478, as follows:

"It is to be remembered that a drainage district has the special purpose of the improvement of particular property, and when it is so formed to include property which is not, and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation."

It was said in an independent suit brought long after the District was created and long after the assessments were levied; and an injunction was sustained against assessments levied against un-benefited property within such a District.

At page 14 of the brief there is a quotation from Branson v. Bush, 251 U. S., 215, to this effect: "No agency for such development equals that of good roads." This quotation is misleadingly applied. It is found in the following paragraph: "To this must be added the obvious fact that anything that develops the territory which a railroad serves must neces-

sarily be of benefit to it, and that no agency for such development equals that of good roads."

That a railroad was benefited by the development of the country which it served and that no agency for such development equals that of good roads is no justification for a benefit to be ascribed to the plaintiff's land for roads which serve another section of the county, the nearest point on the road being from two to five miles distant from her land, and which do not develop her land at all, and which roads do not serve her land in any particular. In fact, it is incredible to assume that good roads could in any way benefit lands submerged in bayous and lakes and adorned with cypress brakes, and hence no presumption can be indulged that there is benefit to the major part of plaintiff's land by grading and macadamizing these roads.

Counsel (Brief p. 15) conclude the argument on this issue as follows: "The plaintiff may yet live to bless an enterprise that must in the end enormously enhance the value of her property." The plaintiff must spend $49,000.00 to get this enormous enhancement of her $30,000.00 farm. The blessings of such expenditure can be supported by the highest authority, which counsel do not cite, but which is Acts, ch. 20, v. 35, wherein it is written: "It is more blessed to give than to receive."

Respectfully submitted,

JOSEPH M. HILL,

HENRY L. FITZHUGH

Attorneys for Plaintiff in Error.

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WM. R. STANSBU
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IN THE

United States Supreme Court

MRS. M. L. HOUSE ..... *Plaintiff in Error.*

v. No. 93 October Term, 1923.

ROAD IMPROVEMENT DISTRICT NO. 5 OF CONWAY COUNTY, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

W. P. Strait,
G. B. Rose,
D. H. Cantrell,
J. F. Loughborough,
A. W. Dobyns,
For Defendant in Error.

IN THE

United States Supreme Court

MRS. M. L. HOUSE.....*Plaintiff in Error,*

v. No. 384 of October Term, 1923.

ROAD IMPROVEMENT DISTRICT NO. 5
OF CONWAY COUNTY...*Defendant in Error.*

IN ERROR TO THE SUPREME COURT
OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

Substantially all the questions presented in this case are presented in the case of the same plaintiff in error, hereinafter called the plaintiff, against Road Improvement District No. 2 of Conway County; and, like counsel for the plaintiff, we beg that our brief in that case may be considered by the court in passing upon this. The few questions that remain will require only brief discussion. And again we say that if the court will read the very convincing opinion of

the Supreme Court of Arkansas, which is well printed in 158 Ark. 357, it will probably feel no need of reading this brief.

DISTRICT NOT VOID BECAUSE MORE LAND TO EAST OF MAIN ROAD THAN TO WEST.

Counsel say that the district is void because there is more land in the district to the east of the main road than there is to the west.

The road system of the district is roughly like a letter "E." The main road runs to the northeast. From this there branch two laterals, running east to the boundaries of the district. No laterals leave the main road to the west. The district therefore naturally extends further in an easterly than in a westerly direction. Had it not done so, those on the west would have had legitimate ground to complain.

Moreover, the act contains this provision (Arkansas Road Acts of 1919, Vol. I, p. 1037):

"Section 17. If after the plans have been approved by the county court, the commissioners find that lands beyond the boundaries of the district will be benefited by making the improvements, they shall specially report the same to the county court by filing with the clerk of said county a list of said lands, and thereupon the said clerk shall designate a date of hearing thereon by the county court, and shall

cause to be published once a week for two weeks, in some newspaper published in the county, a notice, which may be in the following form:

" 'Notice is hereby given that there has been filed in my office a report of the commissioners for Road Improvement District Number ....., praying that the boundaries of said district be extended to include the following described lands in the district:

"(Here describe the lands).

"All persons having any interest in any of such lands are notified that the county court of Conway County, will hear said report on the ..... day of ....., and that they may be heard for or against the inclusion of any of said lands in said district at that time."

"The last insertion of said notice to be not less than ten days before the date of the hearing. At the hearing aforesaid the court shall consider the report and hear any parties interested therein; and if it finds that any of the lands in said report will be benefited by the making of the improvements in the district, it shall make an order which shall have the force and effect of a judgment, extending the boundaries of the district to include the benefited lands. From this order an appeal may be taken within ten days, and not thereafter."

It is the established law in Arkansas, and we submit that it should be the established law everywhere where such a provision exists, that he who thinks that he is suffering injustice because lands which will be benefited are omitted from the district should seek his remedy by having the omitted lands brought in, and not by striking down the instrumentality for a necessary public improvement.

Thus, in *Hill* v. *Echols,* 140 Ark. 474, it was held:

"Act 402 of 1919, creating a road district in Woodruff County, failed to include certain lands in the town of Cotton Plant, but provided that the commissioners could include such lands if they thought proper. *Held,* the provision did not invalidate the statute."

And in *Neterer* v. *Dickinson & Watkins,* 153 Ark. 10, the court said:

"Moreover, there is a provision in the statute creating this district authorizing the taxation of omitted lands which may be subsequently found to be benefited by the improvement. This provision eliminates any discriminatory effect of mistake of the lawmakers in omitting benefited tracts from the district, for this provision of the statute constitutes authority to put them in the district and assess them if subsequently found to be benefited."

The same rule was laid down by the Arkansas Supreme Court in this case. In 158 Ark. 360, it says:

"In the first place, section 17 of the act creating the district authorized the county court, upon notice and hearing, to extend the boundaries of the district so as to include any lands benefited by the improvement. The purpose of including a flexible provision of this kind in the act was to preserve its validity in case a demonstrable mistake was made by the legislature in establishing the boundary lines so as to exclude lands benefited by the improvement. The remedy of the property owners was not to impeach the validity of the district on account of exclusion of benefited lands, but to move the inclusion of them."

In so holding, the court below did not discriminate against the plaintiff, but merely applied to her case an enlightened rule well established in the jurisprudence of the State.

It could easily be demonstrated that the district is laid off in a logical manner, so as to embrace those lands that are specially benefited; but in view of the fact that the plaintiff has in her own hands the means of remedying any injustice without destroying the district, we deem it unnecessary to pursue the matter further.

DISTRICT NOT VOID BECAUSE A SMALL CREEK AND MARSHES INTERVENE BETWEEN SOME OF PLAINTIFF'S LANDS AND THE ROAD.

In some cases in Arkansas cited by counsel for the plaintiff it has been held that a district composed of a main body of land and of a disconnected tract were void, because the intervening lands must have been benefited as much as the disconnected tract, and in those cases the statute provided no way to bring the latter in.

On the faith of those decisions counsel contend that because there is a small creek and a marsh separating some of plaintiff's lands from the highway and making access to it difficult, the act creating the district is a nullity. If that be true, the number of improvement districts that will survive the scrutiny of this court will be negligible. In nearly every district there is a range of hills, a marsh or a small stream that prevents easy access to the improvement from some of the lands. The case here is like that presented in *Wilkinson* v. *St. Francis County Road Improvement District,* 141 Ark. 164, where the court say, on page 169:

"There is testimony that much of the land owned by appellant received an assessment greater than its present market value. These were lands shown to be of small value chiefly

because of the recurring overflows from the L'Anguille river, which winds its tortuous course through them. It is not shown or contended that these lands are beyond reclamation by drainage or by levees, and it is a matter of such common knowledge that courts may know it that levees and drains have passed beyond the experimental stage."

There may be streams or marshes so large that they would prevent the formation of a local improvement district embracing lands on both sides. It is hard to imagine an improvement east of the Mississippi or the Hudson that would benefit lands on the west, or one north of the Everglades that would benefit lands on the south. But small streams can be bridged and small marshes drained or circumnavigated. Nowhere are such impediments fatal to an improvement district. Certainly counsel cite no authorities to justify their contention.

In Arkansas the matter has been repeatedly adjudicated.

In *Sadler* v. *McMurtry,* 152 Ark. 621, the lands in question were separated from the road by Saline River, which, though small, is large enough to appear on any map of the State, and by Big Creek; and it was held that they were properly included in the district.

In *Rogers* v. *Arkansas & Louisiana High-*

way Dist., 139 Ark. 322, a drainage ditch 36 feet in width lay between the lands and the highroad, and this was held to be no impediment.

In *Sayle* v. *Road Improvement District No. 16 of Woodruff County*, 246 S. W. 843, it was held:

"That a road improvement district, as laid out by a special statute, included lands separted by a stream or body of water from the area which was contiguous to and might be benefited by the improvement, did not make the inclusion of such lands arbitrary; for, while subject to overflow, they were valuable for grazing and accessible from the road by a ferry and a bridge."

If every district is void where the property owner must bridge a small creek or drain a marsh before he will have direct access to the highway, local improvements must come to an end.

The court below announces the rule to which it has always adhered, and which, so far as we know is universal, that parol evidence will not be admitted to overturn a statute. Such evidence may be received to take a case out of the operation of a statute, but not to strike the statute down. If it were, there could never be any certainty in the law. The evidence in one case would establish the statute, in the next case

it would overthrow it; so that, in the language of Mr. Justice Black, the law would be no more certain than the terms of a horse trade.

That parol evidence cannot be admitted to invalidate a statute has long been the law in Arkansas.

> *Mechanics Building & Loan Ass'n* v. *Coffman,* 110 Ark. 269.
>
> *Niven* v. *Road Impt. District No. 14,* 132 Ark. 240.
>
> *Arkansas Fair Ass'n* v. *Hodges,* 120 Ark. 138.
>
> *Green County* v. *Clay County,* 135 Ark. 301.
>
> *Helena Water Co.* v. *Helena,* 140 Ark. 603.

Therefore the court below properly held that in determining the validity of a statute it could consider only those matters of which it could take judicial cognizance. It could not take judicial cognizance of a petty creek or an insignificant marsh lying between lands of the plaintiff and the road, and therefore declare the statute void because of their existence.

Consider for a moment the result of a contrary ruling. Neither the bondholders nor any other propety owner in the district would be

bound by the decision in this case. Each of them could bring a suit, in which it might be proved that this insignficant creek and this marsh created no serious impediment to access to the road from plaintiff's lands, or that it did create such an impediment; and so the statute would be alternately sustained and overthrown. Existence under conditions of such uncertainty would be intolerable. The only way to avoid so miserable a condition of things is to make the validity of the statute depend on those things of which the courts take judicial notice. Thus a permanent rule can be established.

This rule was laid down in Arkansas as long ago as 1873, when, in the case of the *State* v. *Dorsey County,* 28 Ark. 378, the court held:

"When the constitutionality of an act of the legislature, creating a new county, is questioned because its area is less than the constitutional requirement, or that some county or counties out of which it has been organized has been reduced below six hundred square miles, to determine this fact, the courts cannot look beyond the act itself, or some other official record of like grade and character, or official survey or maps of which they are bound to take judicial notice."

So in *Greene County* v. *Clay County,* 135 Ark. 302, the court held:

"Acts 1895, page 244, detaching a township from Greene County and attaching it to Clay County, cannot be held unconstitutional as reducing Greene County below the constitutional limit of six hundred square miles, inasmuch as the public surveys in existence at the time of passage of such act did not show the area of Greene County, the rule being that when there is a question of fact to be ascertained by the legislature outside of those matters of which both courts and lawmakers must take cognizance, the courts cannot inquire into those facts for the purpose of overturning legislation."

We cannot believe that this court will deny to the Supreme Court of Arkansas the right to determine the character of evidence admissible in an attack upon the statutes of that state, particularly as this court has adopted the same rule of excluding parol evidence to vitiate an act of Congress.

In *U. S.* v. *Ballin,* 144 U. S. 1, 4, this court says:

"It cannot be that we can refer to the journal for the purpose of impeaching a statute properly authenticated and approved, and then supplement and strengthen that impeachment by parol evidence that the facts stated on the journal are not true, or that other facts existed which, if stated on the journal, would give force

to the impeachment. If it be suggested that the Speaker might have made a mistake as to some one or more of these seventy-four members, or that the clerk may have falsified the journal in entering therein a record of their presence, it is equally possible that in reference to a roll-call and the yeas and nays there should be a like mistake or falsification. The possibility of such inaccuracy or falsehood only suggests the unreliability of the evidence and the danger of appealing to it to overthrow that furnished by the bill enrolled and authenticated by the signatures of the presiding officers of the two houses and the President of the United States."

Indeed, this court goes further than the Supreme Court of Arkansas, and will not even look at the journals of Congress when a statute is assailed.

Field v. *Clark*, 143 U. S. 649.

Lyons v. *Woods*, 153 U. S. 649.

Chesapeake & Potomac Tel. Co. v. *Manning*, 186 U. S. 245.

Harwood v. *Wentworth*, 162 U. S. 547.

Flint v. *Stone Tracy Co.*, 220 U. S. 143.

PLAINTIFF'S ASSESSMENT NOT NOW OPEN TO QUESTION.

Counsel say that this case differs from the plaintiff's case against Road Improvement District No. 2 of Conway County in this, that in that case the plaintiff admitted that some benefits accrued to her lands, while here she says that no benefits at all will result.

But, as is shown in that case, the one inquiry is as much precluded as the other by the plaintiff's failure to avail herself of the statutory method of correcting her assessment. Whether her lands were benefited at all, and if so, to what extent, was the question to be decided at the hearing of which plaintiff was duly warned by publication. She neither appeared then nor brought suit within the statutory period to review the finding of the commissioners; and under the decisions of this court in *Milheim* v. *Moffat Tunnel Improvement District,* 262 U. S. 723, *Farncomb* v. *Denver,* 252 U. S. 7, and *Campbell* v. *Olney,* 262 U. S. 352, and under the decision of the Supreme Court of Arkansas in *Bush* v. *Delta Road Improvement District,* 141 Ark. 254, it is now too late to claim that her lands will derive no benefit from the road.

If the matter were open to investigation, there is evidently no merit in the plaintiff's

claim. She admits that she will be benefited by the road of District No. 2 going east and west; but she says that she would not be benefited by a road running to the northeast. Perhaps she would never want to travel that road; but that is not the question. The question is, would such a road enhance the value of her lands.

As was said in *Rogers* v. *Highway Improvement District,* 139 Ark. 322, 325:

"The question is not what the usable value of a road is to a particular tract of land, but to what extent has the improvement enhanced the value of the land. It is against this enhanced value or betterment that the tax is levied to pay for the construction of the improvement which is to bring about the enhanced value. One owner of land might use a road which neither his predecessor nor successor in title would use. But it appears fair and reasonable to say that land must necessarily be benefited or enhanced in value by having an improved road constructed in such proximity that the landowner may use the road if he desires to do so."

In *Branson* v. *Bush,* 251 U. S. 191, this court well says, "No agency for such development

equals that of good roads;" and the plaintiff may yet live to bless an enterprise that must in the end enormously enhance the value of her property.

Respectfully submitted,

W. P. STRAIT,
G. B. ROSE,
D. H. CANTRELL,
J. F. LOUGHBOROUGH,
A. W. DOBYNS,
For Defendant in Error.

Office Supreme Court
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WM. R. STAN

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 93.

MRS. M. L. HOUSE, PLAINTIFF IN ERROR,

vs.

ROAD IMPROVEMENT DISTRICT No. 5 OF CONWAY COUNTY ET AL., DEFENDANTS IN ERROR.

ADDITIONAL BRIEF FOR DEFENDANTS IN ERROR.

The original briefs assume that there lay between plaintiff's lands and the road to be improved a little creek and a small swamp, compelling her to go outside the district to reach the road until the creek should be bridged and the swamp drained. In point of fact the testimony on this point was conflicting, and the finding of the trial court was against the plaintiff on that issue. The Supreme Court of Arkansas did not question the correctness of that finding, but merely decided that upon the facts as claimed by the plaintiff the

district was valid, because the court could not take judicial notice of these trifling obstructions. See the language of the agreed stipulation (Tr., 2 and 3), where, after setting out the testimony for the plaintiff, the stipulation proceeds:

> "That testimony was introduced by defendant district tending to controvert the testimony offered by appellant on this issue, and that the Chancellor decided this issue in favor of the district."

That issue is therefore not before the court.

Respectfully,

W. P. STRAIT.
G. B. ROSE.
D. H. CANTRELL.
J. F. LOUGHBOROUGH.
A. W. DOBYNS.